A REVIEW OF JUDICIAL PRECEDENT CONCERNING AN INDIVIDUAL'S RIGHT TO A PUBLIC EDUCATION UNDER THE UNITED STATES CONSTITUTION

By

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A DISSERTATION PRESENTED TO THE GRADUATE COUNCIL
OF THE UNIVERSITY OF FLORIDA
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE
DEGREE OF DOCTOR OF PHILOSOPHY

UNIVERSITY OF FLORIDA

1975

ACKNOWLEDGMENTS

My sincere gratitude goes first to Professor S. Kern Alexander, University of Florida (Educational Administration), under whose guidance this study was undertaken. I am extremely appreciative for his patient supervision of the research, valuable suggestions, and critical readings of the manuscript.

I am also indebted to Professor K. Forbis Jordan, University of Florida (Educational Administration), for his advice and encouragement throughout this endeavor. Due to his efforts, I received an Education Professions Development Act (EPDA) fellowship which enabled me to pursue my doctoral studies at this time. Gratitude also goes to Professor William Alexander and Professor Arthur Lewis, University of Florida (Curriculum and Instruction), who provided moral support and critiqued the dissertation text.

Others who contributed assistance and/or encouragement include: Professor Lawrence Knowles, University of Louisville Law School; Professor William Husk, University of Louisville (Department of Education); Dr. Martin McCullough and Dr. Frank Rapley, Louisville Independent School District; and attorneys Frank Hilliard and Lawrence Tweel, Louisville, Kentucky.

I owe a great debt of gratitude to Ms. Helen Haines, University of Florida Graduate School, who promptly reviewed preliminary drafts of the text, provided continual editorial consultation, and greatly facilitated

the completion of this work. Also, Ms. Elaine Buckley and Ms. Deborah Pitts were most helpful in expediting university logistical matters.

Special thanks go to Ms. Tena Lutz for her diligent typing of the manuscript and her genial attitude throughout the task. In addition, Ms. Tessabell Booker, Ms. Linda Cole, and Ms. Deborah Logan assisted in many ways in the preparation of this dissertation.

Finally, I would like to acknowledge the members of the fellowship group, "Educational Resource Management Specialists," with whom I spent a year at the University of Florida in 1973-74. I owe each of the participants appreciation for their comradeship and unfailing support.

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June, 1975

Chairman: S. Kern Alexander
Major Department: Educational Administration

A goal of egalitarians, seeking reform in public schools, has been to have education afforded constitutional protection by the United States Supreme Court. The federal judiciary has become more aggressive in protecting personal rights and balancing them against governmental interests; hence, the lawsuit is now viewed as the most powerful means to initiate changes in public schooling.

In the 1954 landmark desegregation decision, the Supreme Court proclaimed that when a state provides public education it must be made available to all citizens on an equal basis. However, at the height of prospects for massive judicially required school reform, the Supreme Court declared in 1973 that education is not afforded explicit or even implied constitutional protection. Since the Court's ruling appeared to go against established precedents, this study addresses the need to analyze judicial interpretation of equal protection and due process guarantees under the

fourteenth amendment to ascertain the perimeters of the individual's constitutional relationship to education.

In analyzing the citizen's rights to education and the corresponding duties placed on the state to provide such services, this study surveys the judicial posture toward the denial of education to students for disciplinary reasons or due to characteristics such as marriage, pregnancy, or handicaps. It also focuses on litigation involving discriminatory school practices based on grounds such as race, wealth, achievement, and sex. Since 'the right to education' cannot be divorced from the entire field of constitutional law, relevant non-school cases are also discussed in tracing the evolution of standards used by the Supreme Court to evaluate the legality of state legislation.

After reviewing constitutional adjudication, it is a conclusion that the Supreme Court is more inclined to protect the individual's right to an education in cases of its absolute denial than in situations of its relative deprivation. Although the Court has not interpreted the Constitution as affording protection to 'education' as an inherent right, Supreme Court decisions leave uncertainties as to whether the right to an education is guaranteed as an implied personal liberty under the due process clause. Furthermore, judicial enforcement of equal protection mandates in education has been irregular due to controversy over delineating the nature of 'state intent' required to establish unlawful governmental discrimination.

Presently, the Supreme Court seems disenchanted with both equal protection doctrines formerly evoked to review challenged state action. Thus, the Court appears to be seeking a new equal protection standard

and reviving due process analysis in its search for a 'reasoned' approach to evaluating state laws and practices that will result in the appropriate judicial role of protecting the individual's rights without rendering state legislatures impotent.

No doubt the philosophical breach among members of the Supreme Court has accounted in part for the seemingly inconsistent decisions and the appearance that the citizen's rights to an education have been proclaimed by the Court and then later repossessed. Nevertheless, recent developments regarding constitutional protection of 'the right to education' can be viewed optimistically. In January, 1975, the Supreme Court ruled that students have a state-created protected property right to education which cannot be denied without due process of law.

Although this decision is too recent for its full impact to be realized, its implications may be far reaching indeed. It may encourage students to go beyond claiming their rights to school attendance and begin asserting their rights to fair procedures in assignment to adequate and appropriate instructional programs. The requirement of procedural safeguards when students' interests are impaired by the state can lead to substantial reform in both <u>quality</u> and <u>equality</u> of public educational opportunities.

CHAPTER I

INTRODUCTION AND OVERVIEW OF THE STUDY

The principle of universal educational opportunity is rooted in the democratic process. Compulsory school attendance coupled with increasing financial support for public schools attests to the fact that Americans view education in a seminal position which affects the welfare of both the individual and the state as a whole. During the past two decades the federal courts have assumed a more prominent role in ensuring that the individual's constitutional rights are protected and balanced against the interests of the state. Hence, litigation is now viewed as a powerful tool to use in effecting educational reform and in delineating a doctrine to protect the rights of children.

At the present time, however, the constitutional status of a person's right to a public education and of the corresponding obligations placed on the state in providing this opportunity remains uncertain. Therefore, judicial interpretation of federal constitutional mandates will be a crucial force in shaping the future of public schools in this country.

Purpose of the Study

The purpose of this study is to identify and analyze judicial precedent concerning the individual's fundamental, substantive right to a public education under the United States Constitution.

Delimitations of the Study

This study is not a review of legal precedent concerning the protection of an individual's first amendment rights as they intersect with the public schools. Likewise, it is not the purpose of this project to argue the unconstitutionality of racial, sexual, or financial discrimination in public education. These topics are felt to be of utmost importance, but they are not the central thrust of the present study. These issues are discussed only in relation to the light they shed on the question of whether an individual has a constitutionally protected right to a public education itself.

In addition, this study is not concerned with public educational policy under state constitutional mandates and state statutes. State court decisions are reported only if they relate directly to the status of education under the Federal Constitution.

Definition of Terms

(1) Constitutional right: A right guaranteed to the citizens by the Constitution and "so guaranteed as to prevent legislative interference therewith."[1]

(2) Fundamental interest: A person's natural rights, among which are the right to personal liberty and property; to free access to courts of justice; to due process of law and to equal protection of the laws; and to such other immunities as are indispensable to a free government.[2] A fundamental interest designates a right "of such

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[1] H. Black, Black's Law Dictionary (4th rev. ed. 1968).

[2] J. Ballentine, Law Dictionary and Pronunciations (1948). According to Hogan, the main difference between a 'constitutional right' and a 'fundamental interest' is that the former is specified in the Constitution while the latter is not. J. Hogan, The Schools the Courts, and the Public Interest 59 (1974). The judicial treatment afforded to both categories is essentially the same. Therefore, throughout this study the terms 'constitutional right', 'substantive right', and 'fundamental interest' are used interchangeably.

a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[3]

(3) Procedural due process: Law in the regular course of administration through courts of justice, according to those rules and forms which have been established for the protection of private rights. The essential elements of 'due process of law' are notice of charges, the opportunity to be heard, and an impartial tribunal.[4]

(4) Substantive due process: A protection against arbitrary legislation, demanding that before the state can infringe upon a person's life, liberty or property, it must have a valid objective and the means selected must have a real and substantial relation to the object sought to be attained.[5]

Justification of the Study

Alex de Tocqueville noted that all important social issues in America eventually become judicial issues.[6] This observation is verified in the field of education, as litigation in this arena has increased dramatically in recent years. Prior to 1850, education was mainly ignored by both federal and state courts.[7] Thus, practices at the local level were left largely unquestioned, whether or not they conflicted with the Federal Constitution. From 1850 to 1950 education became firmly established as a state responsibility,[8] and most litigation during this period took place in state courts. Prior to 1954, slightly

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[3]Powell v. Alabama, 287 U.S. 45, 67 (1932).

[4]H. Black, supra note 1.

[5]Sims v. Bd. of Educ. of Indep. School Dist. No. 22, 329 F. Supp. 678, 682 (D.C. N.M. 1971).

[6]A. de Tocqueville, Democracy in America 280 (rev. ed. 1945).

[7]See generally J. Hogan, supra note 2, Chapter 2.

[8]See State ex rel. School Dist. No. 29, Flathead County v. Cooney, 102 Mont. 521, 59 P.2d 48 (1936); Flory v. Smith, 145 Va. 164, 134 S.E. 360 (1926); City of Louisville v. Commonwealth, 134 Ky. 488, 121 S.W. 411 (1909).

over 100 cases involving education had been initiated in federal courts.[9] However, since 1954, well over 1000 cases concerning education have been litigated at the federal level. This increasing reliance on the federal judiciary is indicative of the growing public dissatisfaction with the efforts of the legislative bodies to effect reform in public education.

United States Court of Appeals Judge J. Skelly Wright presented the following rationale for the entry of the judiciary into a domain which has traditionally been the sole prerogative of the state legislatures:

> It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where Constitutional rights hang in the balance.[10]

The "egalitarian revolution"[11] coupled with efforts to balance state and individual interests has generated great controversy in the educational arena by constitutional adjudication concerning desegregation,[12] separation of church and state,[13] school financing,[14] and

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[9] J. Hogan, supra note 2, at 7.

[10] Hobson v. Hansen, 269 F. Supp. 401, 519 (1967), aff'd sub nom. Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969).

[11] See P. Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," 35 U. Chi. L. Rev. 583 (1968).

[12] See Brown v. Bd. of Educ. of Topeka, Kansas, 347 U.S. 483 (1954); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Milliken v. Bradley, 94 S. Ct. 3112 (1974).

[13] See School Dist. of Abington Township v. Schempp, 347 U.S. 203 (1963); Lemon v. Kurtzman, 403 U.S. 602 (1971).

[14] See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

special education.[15] However, at the height of prospects for massive educational reform initiated through the judiciary, hopes were dampened by the Supreme Court ruling in San Antonio Independent School District v. Rodriguez. Justice Powell, speaking for the Court, stated:

> Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three judge panel below that "the grave significance of education both to the individual and to our society" cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . . Education, of course, is not among the rights afforded explicit protection under the Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.[16]

Thus, by a five to four margin, the Supreme Court held that education is not a fundamental interest which is protected by the Constitution of the United States. However, the Court did not rule out the possibility that failure of the state or school to provide an adequate education to all children could violate the guarantees of the fourteenth amendment.[17] As Silard has aptly stated: "Opponents of public school equalization won a split decision in Rodriguez, but they did not deliver a knockout punch."[18] Hence, in light of Rodriguez, the fundamentality of education is still in question.

There is little doubt that the Supreme Court occupies a key role in the unfolding drama of educational reform in its position as "final

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[15]See Pennsylvania Ass'n for Retarded Children (P.A.R.C.) v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

[16]411 U.S. 1, 30-35 [Hereinafter cited as Rodriguez].

[17]Id. at 36-37.

[18]J. Silard, "School Finance Equalization: The Beat Goes On," 2 J.L. & Educ. 470 (1973).

arbiter of the nature and limits of state power under the Constitution."[19] If the Supreme Court affords constitutional protection to the individual's right to public schooling, then all state educational policies and practices become candidates for being brought before the courts and subjected to strict judicial review.

This study, therefore, is justified to identify legal precedent concerning an individual's constitutional relationship to public education. By analyzing the individual's rights under established principles of law, it will be possible to ascertain what the courts should do when faced with educational adjudication, if they are to be consistent with judicial precedent. Thus, an appraisal can be made of the powers of the courts to order changes in the organization, administration, and programs of public schools in this country.

Procedure

Basically, the procedure includes searching Supreme Court cases, federal circuit court decisions, and recent federal district court rulings in an attempt to identify sources of precedent concerning the individual's rights to a public education.[20] Legal reasoning or reasoning by analogy is used throughout this study.[21] Thus, a rule of law announced as precedent in one case is made applicable to a second case involving a similar factual situation. The review includes Supreme Court

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[19] J. Coons, W. Clune, & S. Sugarman, Private Wealth and Public Education 287 (1970).

[20] State court cases are also reported if they deal with interpreting the Federal Constitution as it relates to education.

[21] See E. Levi, An Introduction to Legal Reasoning 1-2 (1948).

decisions that have established principles which apply to education, regardless of whether the facts of the cases involve a school matter. Hence, education can be compared to other activities which are being challenged in the courts under similar constitutional provisions.

Specifically, resources used to locate cases include the legal card catalog, legal periodicals, the American Digest System, Shepard's Citation, American Law Reports, American Jurisprudence, and Corpus Juris Secundum. After locating relevant court cases, the original source material is used in briefing and reporting the judicial decisions cited in this study.

Overview of Remaining Chapters

The succeeding chapters in this dissertation examine the following topics:

Chapter II explores the governmental interests in providing public education, including a discussion of the benefits which accrue to the state as a result of public schools.

Chapter III examines legal precedent and recent developments concerning an individual's substantive rights to an education provided by the state.

Chapter IV describes judicial requirements concerning 'equal treatment of equals' and the resulting obligations placed on the state to provide equal educational opportunities for all citizens.

Chapter V presents findings of fact, conclusions of law, and observations concerning the present judicial posture toward the individual's constitutional relationship to public education.

CHAPTER II

GOVERNMENTAL INTERESTS IN EDUCATION

Education is not a cloistered institution and can only be understood in the context of its environment which it mirrors and in turn influences. In a nation of representative government, laws reflect the beliefs, values, and aspirations of the people.[1] Thus, the following statement from the Declaration of Independence sets a backdrop against which to view the evolution of public education in the United States:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . .[2]

Education and a Democratic Nation

The relationship between an educated citizenry and the survival of a democratic nation has been reiterated throughout the history of this country. George Washington made this recommendation in his "Farewell Address":

> Promote then as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives

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[1] See R. Hamilton & P. Mort, The Law and Public Education, Chapter 2 (2d ed. 1959).

[2] C. Beard, M. Beard, & W. Beard, New Basic History of the United States 471 (1960).

> force to public opinion, it is essential that public opinion should be enlightened.[3]

Likewise, Thomas Jefferson was an early champion of universal education. His sentiments were revealed in the statement: "If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."[4]

The Federal Government and Education

As early as 1785 the federal government began aiding education in territories by endowing schools with public land. The Northwest Ordinance of 1787 stated: "[S]chools and the means of education shall forever be encouraged."[5] Although there was national interest in education, there was also fear of a strong centralized government that might usurp the powers of the individual states. Hence, the Federal Constitution which was ratified in 1789 did not mention education. The tenth amendment to the Constitution, which was part of the original Bill of Rights, stated:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

Thus, via the tenth amendment, the power to provide and maintain public schools became inherent in the sovereign powers of state.

Often the judiciary has been called upon to clarify the role of the federal government in the public educational arena. Justice Harlan

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[3]L. Cremin, The American Common School 29 (1951).

[4]Id.

[5]Financing Education 386 (R. Johns, K. Alexander, & K.F. Jordan, eds. 1972).

in 1899 made the following comments concerning the state's authority over public education:

> Education is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.[6]

More recently, in Epperson v. Arkansas, the United States Supreme Court stressed that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint."[7] The Court emphasized that education is controlled by the states and further declared: "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."[8]

Although the federal judiciary will not interfere with the internal operations of the schools unless a constitutional issue is at stake, during the past few decades the federal government has exerted considerable influence over public schools through its capability to distribute discretionary funds. The taxing clause of the Constitution confers upon Congress the power "[T]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."[9] Even though this

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[6]Cumming v. Bd. of Educ., 175 U.S. 528, 545 (1899).

[7]393 U.S. 97, 104 (1968). In this case the Supreme Court invalidated an Arkansas statute which forbid teaching Darwin's theory of evolution in the public schools.

[8]Id.

[9]Constitution of the United States, Art. I, Section 8, cl. 1.

clause historically has aroused much debate,[10] the Supreme Court has interpreted the provision as giving Congress implied authority to distribute tax moneys for educational purposes.[11] Thus, school districts and state education agencies must adhere to federal guidelines and regulations in order to qualify for the receipt of federal funds.

Education as a State Responsibility

Although there was no mention of education in the Federal Constitution, this was not true of state constitutions. Many state constitutional mandates, such as the following, included explicit provisions concerning public education:

> The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years may be educated gratuitously.[12]

> The legislature shall encourage the promotion of intellectual, moral, scientific and agricultural improvement by establishing a uniform system of common schools, and schools of a higher grade, embracing normal, preparatory, collegiate and university departments.[13]

> The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the legislature to establish and

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[10] See K. Alexander, R. Corns, & W. McCann, Public School Law: Cases and Materials 35-44 (1969).

[11] In Helvering v. Davis, 301 U.S. 619 (1937), the Supreme Court upheld the Social Security Act and ruled that Congress could tax and spend monies under the general welfare clause of the Constitution.

[12] Constitution of Colorado, Art. IX, Sec. 2

[13] Constitution of Kansas, Art. 6, Sec. 2.

> wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education.[14]
>
> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.[15]

State constitutions made the state formally responsible for public education but the early localism of the frontier and geographic isolation encouraged the state to surrender educational decision-making to smaller and smaller political subdivisions. Coons et al. have asserted that in the early days education was thought to be the "sphere of the individual," and every governmental act relating to education was viewed as a possible intrusion. State leadership in education was opposed by powerful citizens, so the state legislatures "passed the buck" to the "smallest workable unit for the task."[16] Therefore, the tradition of local control of public education was implanted early in this nation's history.

The initial religious motive for providing public schools, characterized by the Massachusetts "deluder Satan" laws of 1642 and 1647, was gradually replaced in the states by political motives.[17]

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[14]Constitution of South Dakota, Art. VIII, Sec. 1.

[15]Constitution of Indiana, Art. 8, Sec. 1.

[16]J. Coons, W. Clune, & S. Sugerman, Private Wealth and Public Education 48 (1970).

[17]K. Alexander & K.F. Jordan, "Legal Aspects of Educational Choice: Compulsory Attendance and Student Assignment," Eric Reports, ED 082 273, 1973.

Thus, by the mid-nineteenth century the state had begun to take a greater interest in public education. The egalitarian spirit of the frontier and Jacksonian democracy paralleled what has been referred to as the great American revival in education.[18] State coordination of public schools gained momentum under the leadership of men such as Horace Mann in Massachusetts, Henry Barnard in Connecticut, Calvin Stowe in Ohio, Calvin Wiley in North Carolina, and John Breckinridge in Kentucky. The state courts, accordingly, became more active in affirming that the responsibility for public education resided with the state and not with the local political subdivisions.

In 1909 the Court of Appeals of Kentucky clearly defined public education as a state responsibility:

> Education is not a subject pertaining alone, or pertaining essentially to a municipal corporation. Whilst public education in this country is now deemed a public duty in every state, and since before the first federation was regarded as a proper public enterprise, it has never been looked upon as being at all a matter of local concern only.[19]

Similarly, the Supreme Court of Minnesota interpreted the state constitution as placing responsibility for establishing public schools on the state.[20] The court emphasized that the legislature was granted plenary powers over all matters concerning schools except those restricted by constitutional provisions:

> Recognizing the existence of a limited local interest in the matter of education, this court so

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[18]See J. Brubacher, A History of the Problems of Education 44 (1966).

[19]City of Louisville v. Commonwealth, 134 Ky. 488, 492, 121 S.W. 411 (1909).

[20]State ex. rel. Bd. of Educ. v. Erickson, 190 Minn. 216, 221-22, 251 N.W. 519 (1933).

> frequently has affirmed the doctrine that the maintenance of the public schools is a matter of state and not of local concern that it is unnecessary further to review authorities at this date. . . .[21]

State Purposes in Education

The purposes of public education in this country traditionally have been defined from the standpoint of the benefits which accrue to the general welfare of the state. State authority has been based on an interest in ensuring that the individual citizen would achieve a minimum level of education and thus not become a burden to society. Garber has analyzed the purposes of the state in education as revealed by the reports of the debates and proceedings of 37 constitutional conventions. He has summarized the major purposes of public education as: (a) protecting the political safety and well-being of the state, (b) promoting the economic well-being of the state, (c) promoting the elimination of evils such as crime and pauperism, and (d) promoting the well-being of the individual.[22]

Protecting the Political Safety and Well-being of the State

A distinguishing characteristic of the philosophical foundation of this nation was that the government granted to the people more rights and privileges with their corresponding duties and obligations than any nation previously had attempted to do. The states, therefore, soon realized that an educated citizenry would be essential to governmental well-being, since the safety of the state hinged upon the manner in which the people exercised their rights and performed their duties.[23]

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[21] Id.

[22] L. Garber, Education as a Function of the State 4-11 (1934).

[23] Id. at 4.

In 1902 the New Hampshire Supreme Court elaborated on the need for universal education as a means of protecting the well-being of the state. The court observed that the primary reason for maintaining public schools was to create an intelligent citizenry "essential to stability of the state."[24] The court stressed that free schooling furnished by the state was not so much a right granted to pupils as a duty imposed upon them for the public good.[25] Although the court recognized that most people viewed public schools as beneficial to the students, it emphasized that schools were also governmental means of protecting the state from the consequences of an ignorant and incompetent citizenship.[26]

In 1899 the Supreme Court of Tennessee placed the importance of establishing public schools alongside the need for establishing criminal laws and courts to execute them.[27] The court explained that criminal laws further the interests of the state by preserving "the peace, morals, good order, and well-being of society." Likewise, the court concluded that the object of public schools "is to prevent crime by educating the people" and thus secure "a higher state of intelligence and morals . . . and well-being of society."[28]

Similarly, in an early Kentucky case, which affirmed that the locus of responsibility for public schools resided with the state, the court referred to public education "as forming one of the first

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[24]State v. Jackson, 71 N.H. 552, 53 A. 1021, 1022 (1902).
[25]Id., 53 A. 1023-24.
[26]Id. at 1022-23.
[27]Leeper v. State, 103 Tenn. 500, 53 S.W. 962 (1899).
[28]Id., 103 Tenn. 516-17.

duties of a democratic government."[29] In recognizing education as "essential to the preservation of liberty," the court emphasized the high priority given to education by the American people:

> If it is essentially a prerogative of sovereignty to raise troops in time of war, it is equally so to prepare each generation of youth to discharge the duties of citizenship in time of peace and war. Upon preparation of the younger generations for civic duties depends the perpetuity of this government.[30]

Promoting the Economic Well-being of the State

It is generally accepted that public education has a positive effect on the total economic growth of the nation and that increased investment in education contributes to the rising standard of living.[31] The education industry provides employment, produces services needed by the total economy, and contributes to the Gross National Product (GNP) as does any other industry. Thus, education can be considered both a producer's and consumer's good. According to Johns:

> When knowledge and skills are acquired for the purpose of becoming a physician, a teacher, an engineer, a lawyer, a mechanic--or for any objective the major purpose of which is to produce a material or non-material good--education is a producer's good. But when knowledge is acquired to enrich one's own life by increasing his capacity to use, enjoy, or appreciate any material or non-material good that satisfies human wants, education is a consumer's good.[32]

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[29] City of Louisville v. Commonwealth, 134 Ky. 488, 121 S.W. 411, 412 (1909).

[30] Id.

[31] See R. Johns, "The Economics and Financing of Education," Designing Education for the Future No. 5 at 198-202 (E. Morphet & D. Jesser, eds. 1968).

[32] Id. at 200.

Economists have discussed the economic benefits of education in terms of both individual and societal benefits. Houthakker, in 1959, reported that high school education, in addition to an eighth grade education, increased one's lifetime income 41 percent over the amount received by persons with only an eighth grade education.[33] Similarly, in 1960, Miller estimated that high school education in addition to eighth grade education increased lifetime income 43 percent.[34] However, neither of these researchers made allowances for differences in ability, inherited wealth, or other such variables. Therefore, Denison has estimated that the above calculations should be discounted by 40 percent in order to take into consideration the non-educational factors affecting one's income.[35] However, even when discounted 40 percent, the differentials in lifetime income caused by different levels of education remain significant.

Becker and Schultz used a different approach in computing the value of education to the individual by comparing the interest return on financial investments in education with the interest return on investment in the private sector of the economy. They found the rate of return for investments at all levels of education to be higher than the rate of return for similar investments in the private economy.[36]

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[33]H. Houthakker, "Education and Income," Review of Economics and Statistics 41, February, 1959, at 24-28.

[34]H. Miller, "Annual and Lifetime Income in Relation to Education 1939-1959, " American Economic Review 50, December, 1960, at 962-86.

[35]E. Denison, The Sources of Economic Growth in the United States and the Alternatives Before Us 69-70 (1962).

[36]T. Schultz, "Education and Economic Growth," Social Forces Influencing American Education 46-48 (National Society for the Study of Education, Sixteenth Yearbook, 1961). See also G. Becker, Human Capital (1964).

It is an easier task to measure the cash benefits of education to the individual than to measure the social or indirect economic benefits of education. However, Denison made a careful study of the growth rate of the GNP between the years 1929 and 1957, analyzing both positive and negative contributing factors. He concluded that increased inputs of education and knowledge accounted for 39 percent of the total growth of the GNP during that period.[37] In addition, Denison reported that education accounted for one-third of the difference in United States per capita income between 1925 and 1960.[38] Fabricant also has suggested that investments in education, research and development, and other intangible capital might account for much of the unexplained annual increase in the national product.[39]

Many social benefits of education cannot be easily quantified in dollars. The educational level of one's neighbors indirectly affects his enjoyment of increased educational benefits himself. Weisbrod has observed that the individual's education spills over to benefit his neighbors, fellow-workers, and society in general. He has suggested that these external benefits provide a sound rationale for compulsory attendance laws as well as for public financial support of education.[40] Also, the increasing mobility of the American population and the fiscal interdependence of various sections of the country cause educational

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[37] E. Denison, supra note 35.

[38] E. Denison, cited in K. Alexander & K.F. Jordan, supra note 17, at 2.

[39] S. Fabriant, Prerequisites for Economic Growth (1959).

[40] B. Weisbrod, External Benefits of Public Education 117 (1964).

decisions made at the local district level to have widespread effects on the nation as a whole.[41]

Promoting the Elimination of Evils Such as Crime and Pauperism

Researchers have shown that the crime rates and rates of dependency on public welfare or private charity are substantially greater among people who have little educational background than among those with an adequate education.[42] According to Johns:

> It is difficult to make a valid estimate, but, as one views the future, it is reasonable to predict that the economic cost of failing to educate the population will be far greater than would be the cost of the additional financial inputs necessary to provide the quality and quantity of education necessary for all of the people.[43]

Education is viewed as a route to social mobility and to the achievement of social equality. Although increased educational opportunities cannot guarantee that the cycle of poverty will be broken, universal education is a major hope for reducing social stratification in this country and increasing the alternatives available for each individual. Dewey has observed that a society marked off into separate classes needs to educate only its ruling class. In contrast, however, a society that believes in equality, mobility, and progress "must see to it that its members are educated to personal initiative and adaptability."[44]

Mann also saw public education as the means to achieve social equality in this nation. "Education," he declared in memorable words,

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[41] Id.

[42] See R. Johns, supra note 31, at 207-08.

[43] Id. at 207.

[44] J. Dewey, Democracy and Education 87-88 (1966).

"beyond all other devices of human origin is the great equalizer of the conditions of men--the balance wheel of the social machinery. . . ."[45]

It should be noted that some researchers have questioned the ability of the public schools to counteract the student's family background and remove traces of social inequality. Although these researchers have not dealt with the benefits to the individual of education versus no education, they have explored the marginal returns to the individual of increasing either amounts of education or the levels of expenditure for education. Coleman, in his famous report, indicated that American schools are remarkably uniform and "[t]hat schools bring little influence to bear on a child's achievement that is independent of his background and general social context."[46] Jencks went even further with the assertion that the school budget, facilities, program, and teacher characteristics have little impact on the variations in future success among children.[47]

Although the public schools may not be able to eliminate poverty, crime, and social inequality, some current researchers are refuting the hypotheses accepted by Coleman and Jencks. Walberg and Rasher recently reported a high correlation between homicide rates and low educational achievement.[48] They also found a significant correlation

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[45] M. Mann, Life and Works of Horace Mann 668-69 (1868).

[46] J. Coleman et al., Equality of Educational Opportunity 325 (1966).

[47] C. Jencks et al., Inequality: A Reassessment of the Effect of Family and Schooling in America (1972).

[48] H. Walberg & S. Rasher, "Public School Effectiveness and Equality: New Evidence and Its Implications," Phi Delta Kappan, September, 1974, at 3-9.

between resource inputs and student achievement. Although the debate may continue concerning the impact of schools on the future success of students, it cannot be contested that public schools have contributed to the fact that the United States has one of the lowest illiteracy rates and highest standards of living of any nation in the world.

Protecting the Well-Being of the Individual

Traditionally, the interests and goals of the state have also been those of the people. Individual liberty was to be protected and guaranteed by public education. An education was to enable an individual to exercise fundamental constitutional rights as well as to obtain income and status.

The school has been entrusted with aiding the student to develop an independence of thought and freedom from the confines of conformity. Dewey felt strongly that the school should facilitate the integration of the individual into the complexities of American life:

> The school has the function . . . of coordinating within the disposition of each individual the diverse influences of the various social environments into which he enters. One code prevails in the family; another, on the street; a third, in the workshop or store; a fourth, in the religious association. As a person passes from one of the environments to another, he is subjected to antagonistic pulls, and is in danger of being split into a being having different standards of judgment and emotion for different occasions. This danger imposes upon the school a steadying and integrating force.[49]

The state has at least two major responsibilities in protecting the individual's interests (well-being) in public education. First the state has the responsibility to protect the child from parental

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[49]J. Dewey, supra note 44, at 22.

neglect or abuse. In addition, the state must ensure that the child's or parents' constitutional rights are not arbitrarily or unnecessarily interfered with by restrictive state legislation. The federal courts have recently been more attentive to the protection of the individual's rights in the educational arena. Whereas the courts traditionally deferred to educators, now they are delving more deeply into the constitutionality of educational policy. It has been judicially declared that a child does not shed his constitutional rights at the schoolhouse door.[50]

In ruling on the constitutionality of a West Virginia statute requiring school children to salute the American flag and pledge their allegiance, the Supreme Court overruled the state's interests and held that the statute violated the individual's fundamental liberties.[51] The Court recognized that the freedom asserted by the students did not bring them into conflict with the rights of other individuals or threaten to disrupt the school. The Court further elaborated:

> The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.[52]

The Supreme Court further emphasized the state's responsibility to protect the "constitutional freedoms of the individual, if we are

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[50]Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

[51]West Virginia State Bd. of Educ. v. Burnette, 319 U.S. 624, 630-31 (1943).

[52]Id. at 626.

not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[53] Thus, interference with a child's fundamental liberties must be weighed against the state's interest in providing universal education for the well-being of the state as a whole.

Parens Patriae and Compulsory Attendance

The doctrine of parens patriae came to the United States from the English court of chancery where the chancellors of the king were accountable for the general protection of the infants in the kingdom. The sovereign thus became responsible for the welfare of all children who might be abused, neglected, or otherwise mistreated by their parents.[54] In this country, the state has replaced the crown in the area of child welfare.

The power of the state to override the interests of parents often has been a controversial issue. Although basic public opinion generally has endorsed state intervention in the family in instances of child neglect, the movement toward acceptance of compulsory school attendance laws has met with some resistance. In the early days of this nation the aspirations of the people reflected an agrarian, immobile society. Children were often needed to work on the farms, and the importance of schooling was not perceived as critical to future success in life. However, in the aftermath of the industrial revolution the need

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[53] Id. at 629. See also People of Ill. ex rel. McCollum v. Bd. of Educ., 333 U.S. 203 (1948); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

[54] M. Rosenheim, Justice for the Child 22-23 (1962).

decreased for children to work on the family farm, and educational achievement became a more crucial factor in determining one's future employment and income.[55] Also, as labor became organized and the factory system expanded, children came into competition with adults on the labor market.

Thus, the movements toward requiring school attendance and establishing child labor laws paralleled and nurtured each other. Although both of these interventions have served to limit the options available to the individual, the primary motive has been for the health and future well-being of the child,[56] with protection of the adult worker's position remaining a secondary purpose.

Massachusetts established the first modern compulsory attendance law in 1852, and by 1920 all other states had followed suit.[57] Since compulsory attendance statutes require school attendance and penalize the parent for noncompliance, the parent is charged with a duty both to his child and to the state.

The courts have often been asked to review the legality of the state's power to compel school attendance. In most of the litigation, the interests of the state (in behalf of protecting the child) have prevailed over the interests of the parent unless a fundamental right

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[55] K. Alexander & K.F. Jordan, supra note 17, at 9.

[56] See Wisconsin v. Yoder, 406 U.S. 205 (1972), where the Supreme Court recognized that such laws provide the child with the opportunity to prepare for a better livlihood than he could achieve without education.

[57] It should be noted that two states, Mississippi and South Carolina, amended their constitutions and compulsory attendance laws following the 1954 Supreme Court desegregation decision. See Rodriguez, 411 U.S. 1, 112, n. 69 (1973) (Marshall, J., dissenting).

has been arbitrarily denied or the state has failed to demonstrate at least a rational basis for its affirmative action.

In an early per curiam opinion, the Supreme Court made the following statement concerning the state's power to override the parent's interests, if necessary, to ensure school attendance:

> It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of strict right, the business of education belong to it. * * * The right of parental control is a natural, but not an unalienable one. It is not excepted by the declaration of rights out of the subjects of ordinary legislation; and it consequently remains subject to the ordinary legislative power which, if wantonly or inconveniently used, would soon be constitutionally restricted, but the competency of which, as the government is constituted, cannot be doubted.[58]

The courts have consistently upheld broader state authority over children's activities than over like actions of adults. In Prince v. Massachusetts, the legal guardian of a 9-year-old child was found guilty of contributing to the delinquency of a minor by permitting the child to sell Jehovah's Witnesses publications on a public street. The Supreme Court was split by the choice between private rights and the state's parens patriae role, but Justice Rutledge, writing for the majority, stated that the guardian was violating the Massachusetts child labor laws. Although the Court accepted that the "sacred private interests" involved in this case were fundamental to a democracy, it ruled in favor of the societal purpose to protect the welfare of children: "It is in the interest of youth itself, and of the whole community, that children be both

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[58]Ex parte Crouse, 4 Whart. 9, 11 (1839).

safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."[59]

Justice Rutledge took the opportunity in Prince to elaborate on the relationship between parental rights and the state's parens patriae role:

> But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. * * * And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well-being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.[60]

In Ginsberg v. New York, the Supreme Court followed the Prince decision and specifically confirmed broader power for the state to regulate conduct of children than conduct of adults.[61] Similarly, in Ford v. Ford, the Supreme Court reiterated its commitment to protect the infant from parental abuse:

> Unfortunately, experience has shown that the question of custody, so vital to the child's happiness and well-being, frequently cannot be left to the discretion of the parents.[62]

Therefore, the power of the parent, even when "linked to a free exercise claim,"[63] may be limited by the state if it appears that

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[59]321 U.S. 158, 165 (1944).

[60]Id. at 166-168.

[61]390 U.S. 629 (1968).

[62]371 U.S. 187 (1962). See also Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

[63]State of Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972).

parental decisions will jeopardize the health, safety, or future well-being of the child. In 1948 the Virginia Supreme Court commented concerning the state's power to enforce school attendance in the child's interest, although it conflicted with the parent's religious beliefs:

> Obviously, an illiterate parent cannot properly educate his child, nor can he, by attempting to do so, avoid his obligation to send it to a school. No amount of religious fervor he may entertain in opposition to adequate instruction should be allowed to work a lifelong injury to his child. Nor should he, for this religious reason, be suffered to inflict another illiterate citizen on his community or his state.[64]

The issue of pupil vaccination often has surfaced the conflict between parental and state interests. Schools, by law, may require school age children to submit to vaccination against certain diseases before they enter school. The state's objective in requiring vaccination as a prerequisite to school attendance is to provide for the general health and continued well-being of all children. If not immunized, students are not permitted to enter school, and consequently parents may be prosecuted for indirect violation of compulsory attendance laws.[65]

Although compulsory attendance statutes have been upheld, even when conflicting with first amendment freedoms, in some instances affirmative state action concerning education has been invalidated when infringing upon basic personal rights. In Meyer v. Nebraska, the

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[64]Rice v. Commonwealth, 188 Va. 224, 49 S.E. 2d 342, 348 (1948).

[65]K. Alexander, R. Corns, & W. McCann, supra note 10, at 550. See State v. Drew, 89 N.H. 54, 192 A. 629 (1937); Mosier v. Barren County Bd. of Health, 308 Ky. 829, 215 S.W. 2d 967 (1948).

the Supreme Court held that the child's right to learn, the teacher's right to teach, and the parents' right to have the child taught could not be interfered with by legislative restrictions concerning teaching the German language to children below the eighth grade.[66]

Also, in Pierce v. Society of Sisters, the Supreme Court held that the state's responsibility in providing education must yield to the right of parents to provide an equivalent education in a privately operated system.[67] Thus, the Oregon statute requiring attendance in a public school from age eight to age sixteen unreasonably interfered with the interest of parents in directing the rearing of their children. The Supreme Court noted its high regard for the parent's right to control his child:

> The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[68]

Recently, in State of Wisconsin v. Yoder, the Supreme Court held that Amish children were exempted from compulsory attendance requirements after reaching the eighth grade. The Court recognized the state's responsibility for educating its citizens and its power to reasonably regulate and control the length of basic education. Chief Justice Burger even stated for the Court that "[p]roviding public

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[66]362 U.S. 300 (1923).
[67]268 U.S. 510, 535 (1925).
[68]Id.

school ranks at the very apex of the function of a state."[69] Nevertheless, the Court declared that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests."[70] After analyzing the history of the Amish people, the Court concluded that the compulsory attendance laws forced Amish children "to perform acts undeniably at odds" with their mode of life and deep personal convictions.[71]

Therefore, the Supreme Court concluded that an additional one or two years of formal high school for Amish children would do little to further the state's interests in warding off ignorance and creating an educated citizenry. In limiting its decision to Amish children, the Court emphasized:

> It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society. . ., but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.[72]

The Court also stated that it was not trying to function as a school board or legislature and cautioned other courts to move "with great

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[69] 406 U.S. 205, 213 (1972).

[70] Id. at 214.

[71] Id. at 218.

[72] Id. at 222.

circumspection" in balancing the state's legitimate interests against religious claims for exemption from any educational requirements.[73]

Justice Douglas dissented in part in this decision because he felt that the religious views of the child, whose parent was the subject of the suit, were not given sufficient attention by the Court. He fully concurred with the judgment for one of the defendants, whose child had testified that her own religious views were contrary to the state requirement of two years of high school education. However, Justice Douglas felt that the case should have been remanded back to the lower court concerning the other defendants in order that the children could have had an opportunity to be heard.[74]

The State's Obligation to the Child

The past two decades have witnessed stricter judicial scrutiny of state purposes when educational legislation interferes with basic civil rights. The state must have a rational basis, and in some cases a compelling interest, for action which denies the individual the opportunity to exercise his fundamental rights. Ease of administration or conservation of public funds can no longer be the sole justification for interference with personal liberties.[75]

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[73] Id. at 235. Although the Supreme Court specifically limited its decision to Amish children, the Court may be faced in the near future with claims that question the necessity for compulsory attendance beyond the eighth grade for any children. This is especially likely in view of the recent report of the National Commission on Reform of Secondary Education which recommended that compulsory school attendance end at eighth grade. The Reform of Secondary Education 21 (1973).

[74] 406 U.S. 205, 240-246 (1972) (Douglas, J., dissenting).

[75] See Mayer v. Chicago, 404 U.S. 189, 197 (1971); Graham v. Richardson, 403 U.S. 365, 374-75 (1971); Bell v. Burson, 402 U.S. 535, 540 (1971); Shapiro v. Thompson, 394 U.S. 618, 633 (1969); Pennsylvania Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972).

Although the judiciary will no doubt continue to balance state and parental interests in reviewing educational policy, recently more emphasis has been given to delineating the rights of the child himself. Thus, the child is becoming a more equal partner in the interest triad, instead of remaining in the background with either the state or parent asserting interests in his behalf. The courts are becoming more protective of the child's right to know,[76] to express,[77] and to freely exercise religious beliefs.[78]

Prior to the 1950s, public education was often viewed as a political privilege bestowed upon the individual by the state. In 1926 the Virginia Supreme Court espoused this philosophy in a case challenging the reasonableness of a school regulation:

> While it may be a restraint upon liberty and an infringement upon happiness for the legislature to inhibit a parent from sending his child to any school, it is neither restraint nor infringement for the Legislature to enact laws to debar a child from the mere privilege of acquiring an education at the expense of the state until he is willing to submit himself to all reasonable regulations enacted for the purpose of promoting efficiency and maintaining discipline.[79] [emphasis added]

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[76]See Meyer v. Nebraska, 265 U.S. 390 (1923); Keyishian v. Bd. of Regents, 335 U.S. 589, 603 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).

[77]See Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

[78]See Wisconsin v. Yoder, 406 U.S. 205 (1972); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[79]Flory v. Smith, 145 Va. 164, 134, S.E. 360 (1926). See also Bozeman v. Morrow, 34 S.W. 2d 645 (Tex. Civ. App. 1931); Richardson v. Braham, 125 Neb. 142, 240 N.W. 557 (1933).

However, it can be argued that the compulsory nature of education conflicts with the concept that public education is a 'privilege'. In a privilege relationship, the recipient has the option of accepting or rejecting the benefits involved. In the instance of school attendance, although the individual has the option of attending private or public schools, he does not have the alternative of entering the labor market instead of going to school until he reaches the age required by law.

Thus, new issues are surfacing concerning the state's responsibility to the child in the domain of public education. Since the student's liberty is curtailed by compulsory attendance, are there benefits which the student can expect, or even demand, as a result of the extensive intervention of schooling in his life? Does the state have a duty to make educational opportunities available to all on equal terms? Is compulsory education itself an unconstitutional denial of an individual's liberty? Can a state decide to withdraw totally from the public educational arena?

It is a contention throughout this study that the courts should take a more active posture in litigating such issues and in defining the obligations placed on the state in order to justify mandatory school attendance. The remaining chapters explore the legal basis for an individual to assert his rights to a public education and the circumstances under which equal educational opportunities must be provided.

CHAPTER III

SUBSTANTIVE RIGHTS TO AN EDUCATION

For many years the individual's interests in public education have been a part of and in tension with the interests of the state. Since education is not mentioned in the Federal Constitution, the individual must use the guarantees of the fourteenth amendment in order to challenge the police power of the state. Section I of the fourteenth amendment reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The fourteenth amendment is designed to limit state action (legislative, judicial, or executive) which denies to citizens of the United States equal protection of the laws or interferes with life, liberty or property without due process of law. In the Civil Rights Cases in 1883, the Supreme Court stated:

> The first section of the Fourteenth Amendment is prohibitory in its character, and prohibitory upon the states. . . . It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the Amendment. It has a deeper and broader scope.[1]

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[1]109 U.S. 3 (1883).

Forkosch has referred to the first section of the fourteenth amendment as "probably the greatest single source of the rights of persons and of limitations upon the states that exists in the entire Constitution and all of the other Amendments."[2] Since state action can be found in many situations where governmental involvement is subtle, the problem is not in searching for state action but in determining whether the particular action is constitutional.[3]

An individual's constitutional claim to a public education is based upon guarantees afforded by both the due process and equal protection clauses of the fourteenth amendment. According to Coons et al., due process generally concerns the fundamental fairness and "rationality of the state's treatment of an individual," while equal protection deals with distinctions in the treatment of classes of persons by the state.[4] Thus, if it is established that the individual's interest in education is a constitutionally protected 'liberty' or 'property' right, the state cannot deny him access to public school without due process of law. The equal protection clause, on the other hand, is used to invalidate arbitrary classifications in education which result in discriminatory governmental treatment of certain groups of students. Due process guarantees

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[2]M. Forkosch, Constitutional Law 358 (2d ed. 1969).

[3]See Marsh v. Alabama, 326 U.S. 501 (1946) ('public function doctrine'). See also H. Horowitz, "The Misleading Search for 'State Action' Under the Fourteenth Amendment," 30 S. Cal. L. Rev. 209 (1957). For further discussion of 'state action', see Chapter IV, text with notes 162, 434, infra.

[4]J. Coons, W. Clune, & S. Sugarman, Private Wealth and Public Education 320 (1970).

as a basis for a constitutional right to an education are explored in this chapter, and the following chapter deals with the implications of equal protection mandates in public schooling.

Fourteenth Amendment Due Process Guarantees

The Supreme Court has recognized two aspects of constitutional due process. In substantive due process analysis, the courts examine state action to determine whether the governmental purpose is appropriate for the exercise of governmental power.[5] The legitimacy of legislative 'ends' depends upon whether the affected interest is within the constitutionally protected areas of 'life, liberty or property' which cannot be impaired without an overriding public interest.[6] If the validity of the governmental interest is not in question, then the judiciary must determine that the means employed relate directly to achieving the governmental purpose.[7]

Procedural due process allows the state to deprive a person of life, liberty or property, but requires certain procedural safeguards to ensure fairness.[8] The minimal standards of procedural due process which have been judicially recognized include (a) notice to the individual that he is about to be deprived of his life, liberty or property, (b) an opportunity to be heard, and (c) a hearing that is conducted fairly. The Supreme Court has acknowledged that due process of law does not require a hearing in every possible case of governmental interference

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[5]Allgeyer v. Louisiana, 156 U.S. 578, 591 (1897).
[6]Id. See also Roe v. Wade, 410 U.S. 113, 154-55 (1973).
[7]Lochner v. New York, 198 U.S. 45, 58, 64 (1905).
[8]See Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

with private interests.[9] In 1961, the Court noted that determination of the exact due process procedures required in any specific situation "must begin with an analysis of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action."[10]

Substantive Due Process Liberties

The Supreme Court has held that "where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling."[11] Hence, if a personal liberty is involved, the law must be "necessary, and not merely rationally related to the accomplishment of a permissible state policy."[12]

Although the original intent of the fourteenth amendment was to protect the rights of the Negro race against discriminatory state action,[13] the coverage soon was extended to other groups. In 1886, the Supreme Court used the fourteenth amendment to protect the rights of orientals[14] and the rights of corporations in economic affairs.[15] Bickel has suggested that the fourteenth amendment was "necessarily intended for permanency," so it was designed for expansion in changing circumstances.[16]

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[9]See Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 894 (1961); Stanley v. Illinois, 405 U.S. 645, 650 (1972).

[10]Cafeteria and Restaurant Workers v. McElroy, id. at 895.

[11]Bates v. Little Rock, 361 U.S. 516, 524 (1959).

[12]McLaughlin v. Florida, 379 U.S. 184, 186 (1964).

[13]Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

[14]Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[15]Santa Clara County v. Southern Pacific R.R., 118 U.S. 394 (1886).

[16]A. Bickel, "The Original Understanding and the Segregation Decision," 69 Harv. L. Rev. 1 (1955).

The courts have therefore declared that the substantive aspect of the term 'liberty' includes other guarantees of the Bill of Rights and protects the exercise of these rights against arbitrary state interference. In Gitlow v. New York, the Supreme Court explicitly ruled:

> For present purposes we may and do assume that freedom of speech and of the press--which are protected by the First Amendment from abridgement by Congress--are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States.[17]

Similarly, in Palko v. Connecticut, the Supreme Court held that the individual rights protected against federal intrusion by the various amendments "have been found to be implicit in the concept of ordered liberty and thus through the Fourteenth Amendment become valid . . . against the states."[18] Some justices have questioned the incorporation of all the Bill of Rights under due process protection,[19] but the prevailing view is that explicit constitutional guarantees are shielded by the fourteenth amendment from arbitrary state interference.

Implied Fundamental Liberties

There is more controversy concerning the protection afforded to implied constitutional liberties. As early as 1884, Justice Bradley

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[17]268 U.S. 652, 666 (1924). See also Cantwell v. Connecticut, 310 U.S. 296 (1940) (first amendment religious freedom); Wolf v. People of State of Colorado, 338 U.S. 25 (1949) (fourth amendment search and seisure rights); Mally v. Hogan, 378 U.S. 1 (1964) (fifth amendment self-incrimination protections); Pointer v. State of Texas, 380 U.S. 400 (1965) (sixth amendment right to confront witnesses); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel at trial); Robinson v. State of California, 370 U.S. 600 (1962) (eighth amendment cruel and unusual punishment protections).

[18]302 U.S. 319, 325 (1937).

[19]See Griswold v. Connecticut, 381 U.S. 479, 486 (1964) (Goldberg, J., concurring).

interpreted the term 'liberty' to cover rights other than those stated in the Constitution:

> The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen.[20]

More recently, Justice Wysanki commented for the federal district court in Massachusetts:

> Order can be defined properly only in terms of the liberties for which it exists, as liberty can be defined properly only in terms of the ordered society in which it thrives. As Albert Camus implied in The Rebel, order and liberty must find their limits in each other.[21]

The term 'liberty' is not defined in the Constitution, so the Supreme Court has had to interpret its meaning. Although judicial debate continues and no comprehensive theory has been established for declaring which interests come under the protective umbrella as fourteenth amendment liberties, general consensus has been reached concerning the fundamentality of certain implied rights.

The right to travel has been judicially sanctioned as a fundamental right, although it is not explicitly stated in the Constitution. As early as 1849 Chief Justice Taney made the following observation concerning the right to travel:

> For all the great purposes for which the Federal government was formed, we are one people, with one

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[20]Butchers' Union Co. v. Crescent City, 111 U.S. 746, 762 (1884) (Bradley, J., concurring).

[21]Richards v. Thurston, 304 F. Supp. 449, 452 (D. Mass. 1969), aff'd 424 F. 2d 1281 (1st Cir. 1970).

> common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.[22]

In 1964, the Supreme Court recognized that freedom of travel is a constitutional right, closely related to the rights of free speech and association, which the state cannot deny without demonstrating a compelling interest.[23] Also in 1966, Justice Stewart stated for the majority in United States v. Guest that the constitutional right to interstate travel "occupies a position fundamental to the concept of our Federal Union." He reasoned that the right to travel was not explicitly mentioned in the Constitution because it was deemed so elementary and "conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."[24]

In Shapiro v. Thompson, the Supreme Court held that the state purpose of deterring the in-migration of indigents could not justify a one-year residence requirement for receiving welfare benefits, as this regulation unconstitutionally infringed upon the individual's right to travel.[25] Quoting an earlier case, the Court noted that if a law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it (is) patently unconstitutional."[26]

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[22]Passenger Cases, 7 How. 283, 492 (1849).

[23]Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964).

[24]383 U.S. 745, 757-58 (1966). See also Kent v. Dulles, 357 U.S. 116, 125-26 (1958), where the Court held: "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers . . . and inside frontiers as well, is a part of our heritage. . . ."

[25]394 U.S. 618, 631 (1968).

[26]Id., quoting from United States v. Jackson, 390 U.S. 570, 581 (1968).

The personal rights of marriage and procreation have also been judicially declared to be basic, fundamental rights, although they are not specifically discussed in the Constitution.[27] In Skinner v. Oklahoma ex rel. Williamson, the Court held that state action discriminating against procreation must be strictly scrutinized since "[m]arriage and procreation are fundamental to the very existence and survival of the race."[28] More recently, in Stanley v. Illinois, the Supreme Court noted that the rights of fatherhood and family are "essential" and "basic civil rights of man."[29] Similarly, in Eisenstadt v. Baird, the Court recognized that there is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[30] Also, in Roe v. Wade, the Court emphasized the importance of procreation and its close relationship to the constitutional right to privacy.[31]

The right to vote in state elections has likewise been judicially recognized as receiving implied constitutional protection.[32] The Supreme Court stated as early as 1886 that voting is "preservative of all other rights."[33] In Dunn v. Blumstein, the Supreme Court invalidated a durational residency requirement for voting. The Court concluded that

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[27]See Loving v. Virginia, 388 U.S. 1, 12 (1967). It should be pointed out that Supreme Court discussions of the fundamentality of 'marriage' refer to heterosexual marriages. Constitutional protection has not yet been afforded to homosexual marriages.

[28]316 U.S. 535, 541 (1942).

[29]405 U.S. 645, 651 (1972).

[30]405 U.S. 438, 453 (1972).

[31]410 U.S. 113 (1973).

[32]See Reynolds v. Sims, 337 U.S. 533, 561 (1964). See also Baker v. Carr, 369 U.S. 186, 204-08 (1962), where the Supreme Court required reapportionment of state legislatures to ensure that each legislator would represent the same number of electors.

[33]Yick Wo v. Hopkins, 118 U.S. 356 (1886).

two personal rights were affected by the statute: "The right to travel is merely penalized, while the right to vote is absolutely denied."[34] The Supreme Court has recognized voting as a matter "close to the core of our Constitutional system,"[35] and has repeatedly emphasized the close nexus between the exercise of the state franchise and the basic civil and political rights inherent in the first amendment.[36]

Another interest which the courts have protected as a fundamental liberty is the right to criminal appellate review. In Griffin v. Illinois, the Supreme Court held that judicial scrutiny is required of legislation which discriminates against classes of people concerning access to criminal justice procedures provided by the state.[37] In several cases the Court has recognized that access to criminal appellate review is closely associated with the procedural rights guaranteed by the due process clause of the fourteenth amendment.[38]

Although the Supreme Court has refused to rule on the issue, several lower courts have included the right to personal appearance in the context of the 'liberties' protected by the fourteenth amendment. In Breen v. Kahl, the federal district court stated:

> For the state to impair this freedom [personal appearance], in the absence of a compelling subordinating interest in

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[34]405 U.S. 330, 341 (1972).

[35]Carrington v. Rash, 380 U.S. 89, 96 (1965).

[36]See Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626-29 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966).

[37]351 U.S. 12, 18 (1956). See also Douglas v. California, 372 U.S. 353 (1963).

[38]See Duncan v. Lousiana, 391 U.S. 145 (1968) (right to jury trial); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront one's accusers).

> doing so, would offend a widely shared concept of human dignity, would assult personality and individuality, would undermine identity and would invade human 'being'.[39]

Although consensus has been reached concerning the fundamentality of the above rights, the judiciary to date has failed to articulate definite criteria for declaring which personal interests will be afforded constitutional protection.[40] Justice Goldberg asserted that in deciding which rights are fundamental, "judges are not left at large to decide cases in light of their personal and private notions."[41] In Snyder v. Massachusetts, the Court stated that the judiciary must look at the traditions and collective conscience of the people to determine if a principle is "so rooted [there] . . . as to be ranked as fundamental."[42] Thus, the Court must decide if the right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'."[43]

Education as a Substantive Liberty

It cannot be contested that the Supreme Court has expanded the meaning of 'liberty' to include implied fundamental rights in addition

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[39]269 F. Supp. 702, 706 (W.D. Wisc. 1969), aff'd 419 F. 2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970).

[40]The terms 'right' and 'interest' are found throughout educational jurisprudence to indicate personal liberties which are afforded various degrees of judicial protection. Pound has defined an interest as "a demand or desire which human beings either individually or in groups seek to satisfy." An interest which is protected by law is called a right. R. Pound, Outlines of Lectures in Jurisprudence 96-97 (1943).

[41]Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring).

[42]291 U.S. 97, 105 (1934).

[43]Powell v. Alabama, 287 U.S. 45, 67 (1932).

to explicitly stated constitutional rights, and thus the Court has afforded full fourteenth amendment protection against arbitrary state interference to these 'implied liberties'. However, the status of an individual's substantive right to an education remains less certain. Those supporting the thesis that the right to an education is an implied, constitutionally protected 'liberty' emphasize the crucial role that education plays in the modern state.[44]

Hogan has summarized the arguments set forth by the California Supreme Court as to the indispensable role of education. First, education is essential to a democratic society in order to preserve the individual's opportunity to compete successfully in the economic marketplace. Secondly, education is universally relevant. Also, unlike other governmental services, public education extends over a lengthy period of the individual's life. In addition, the public school attempts to mold a child's personal development in a fashion chosen by the state, and is thus unmatched in the extent to which it influences the youth of society. Finally, education is deemed so important that the state has made both attendance and assignment to a particular district compulsory.[45]

The first Supreme Court decision which addressed education and its relationship to the fourteenth amendment was Meyer v. Nebraska in 1923.[46] In this case a parochial school teacher was dismissed because

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[44]See Serrano v. Priest, 96 Cal.Rptr. 615-18 (1971).

[45]J. Hogan, An Analysis of Selected Court Decisions Which Have Applied the Fourteenth Amendment to the Organization, Administration, and Programs of the Public Schools, 1950-1972 (doctoral dissertation, University of California, 1972), at 149, analyzing Serrano v. Priest, id. at 618-19.

[46]262 U.S. 390 (1923).

he violated a state statute which forbade the teaching of a foreign language to students who had not successfully passed the eighth grade. Although the Nebraska Supreme Court upheld the statute, the United States Supreme Court struck it down as an arbitrary denial of fourteenth amendment liberties. In holding in favor of the teacher's right to teach German, Justice McReynolds stated for the Court:

> The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.* * *
>
> Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare.* * * His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.[47]

Thus, in Meyer, the Supreme Court afforded constitutional protection to the 'liberty to teach' and the 'liberty to learn'. Many subsequent cases have cited Meyer as precedent establishing that the right 'to acquire useful knowledge' is a due process liberty.[48] In the controversial abortion case of 1973, the Supreme Court referred to the Meyer ruling and noted in dicta that the personal right to education has been deemed "fundamental" and "implicit in the concept of ordered liberty."[49]

Shortly following Meyer, the Supreme Court invalidated an Oregon statute which required all students of compulsory attendance age to go to public schools. This case, Pierce v. Society of Sisters, established the precedent that the right to conduct private schools and the right of parents

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[47] Id. at 400. See also Bartels v. Iowa, 262 U.S. 404 (1923).

[48] See discussion accompanying notes 122, 241, infra.

[49] Roe v. Wade, 410 U.S. 113, 152-53 (1973).

to send their children to private schools are among the due process guarantees of the fourteenth amendment.[50] The Society of Sisters argued that this case involved far more important rights than simply the rights of private schools, namely, the rights of parents and of children themselves: "Reflection should soon convince the Court that those rights, which the statute seriously abridges and impairs, are of the very essence of personal liberty and freedom."[51] Justice McReynolds, writing for the Court, recognized the power of the state to regulate education, but he stressed that there were more reasonable and appropriate means of satisfying the state interests than requiring all students to attend public schools.

In 1927, a Missouri tuition requirement for attending public school was attacked as unconstitutional. The Missouri Supreme Court held that the school must grant a diploma to a student meeting all other requirements for graduation:

> The right of children between six and twenty years of age to attend public schools established in their district is a fundamental right which cannot be denied except for the general welfare.[52]

The landmark desegregation case, Brown v. Board of Education of Topeka, is often cited to support the contention that citizens have a substantive right to an education provided by the state. In ruling that

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[50]268 U.S. 510, 518 (1925). See People v. Stanley, 81 Colo. 276, 255 P. 610 (1927).

[51]Id., 268 U.S. 518.

[52]State ex rel. Roberts v. Wilson, 221 Mo. App. 9, 297 S.W. 419, 420 (1927).

segregation by law in public schools violated the Constitution, Justice Warren stated for the unanimous Court:

> Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[53] [emphasis added]

The constitutional status of education was also addressed in Bolling v. Sharpe which was handed down by the Supreme Court on the same day as Brown. In declaring segregation unconstitutional in the schools of Washington, D.C., Justice Warren elaborated on the meaning of the term 'liberty':

> Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.[54]

The Court explicitly stated that unequal education created by segregation constituted an arbitrary deprivation of the students' liberty in violation of the due process clause.

Several lower courts have been more definitive than the Supreme Court in asserting the fundamentality of education. In Hobson v. Hansen, the Washington, D.C. District Court found education to be a "critical personal right" and reiterated the Bolling ruling that equal educational

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[53]347 U.S. 483, 493 (1954) [Hereinafter cited as Brown]. For a discussion of this case as precedent establishing a constitutional right to education, see generally P. Dimond, "The Constitutional Right to Education: The Quiet Revolution," 24 Hast. L. J. 1089 (1973); Coons et al., supra note 4; A. Wise, Rich Schools, Poor Schools, (1968).

[54]347 U.S. 497, 499-500 (1954).

opportunity is a component of the substantive due process mandates.[55] More recently, an Indiana federal court referred to education as a "substantial right, implicit in the liberty assurances of the due process clause."[56]

In 1970, the California Superior Court claimed that the right to receive an education is "an inalienable right, . . . a fundamental right, a legal right, a species of property, equal to, if not greater than, other tangible property rights, it being the right to be a human being."[57] Similarly, in Hosier v. Evans, the federal district court made the following declaration in ruling that children who were not permanent residents of the Virgin Islands had the right to attend public school:

> We are here dealing with an aspect of twentieth century life so fundamental as to be fittingly considered the corner stone of a vibrant and viable republican form of democracy, such as we so proudly espouse, i.e., free and unrestricted public education. Fundamental rights guaranteed by the Constitution may be neither denied nor abridged solely because implementation requires expenditure of public funds; for such purposes the government must raise funds.[58] [emphasis added]

In Manjares v. Newton, the California Supreme Court observed that "an education has become the sine qua non of useful existence."[59] The

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[55]269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969).

[56]Chandler v. South Bend Community School Corp (N.D. Ind. 1971), cited in J. Hogan, The Schools, the Courts, and the Public Interest 4 (1974).

[57]Crawford v. Bd. of Educ. of Los Angeles, "Minute Order" No. 822 at 77 (Cal. Super. Ct., Feb. 11, 1970), cited in J. Hogan, supra note 45, at 288. For excerpts from the decision, see J. Hogan, "The Role of the Courts in Certain Educational Policy Formation," Policy Sciences, Vol. 1, No. 3, Fall, 1970, at 289-97.

[58]314 F. Supp. 316, 319 (D.V.I. 1970).

[59]49 Cal. Rptr. 805, 411 P. 2d 901, 908-909 (1966).

court held that the school board's refusal to authorize transportation, which resulted in the denial of educational opportunities to eight children, was arbitrary and unreasonable:

> In light of the public interest in conserving the resources of young minds, we must unsympathetically examine any action of a public body which has the effect of depriving children of the opportunity to obtain an education.[60]

In 1972, the New Hampshire federal district court emphatically stated: "No authority is needed for the fundamental American principle that a public school education through high school is a basic right of all citizens."[61] Federal courts have also referred to education as "a priceless commodity"[62] and "vital . . ., indeed, basic to civilized society."[63] In the school finance case, Serrano v. Priest, the California Supreme Court made the most explicit statement concerning the fundamentality of education: "We are convinced that the distinctive and priceless function of education in our society warrants, indeed, compels our treatment of it as a fundamental interest."[64]

While lower courts were continuing to rely on Meyer, Pierce, Brown, and Bolling in asserting the fundamentality of education, the Supreme Court in 1973 appeared to go against the precedents it had established in these earlier cases. In Rodriguez, Justice Powell, writing for the majority, stated that education "is not among the rights afforded explicit protection under our Federal Constitution."[65] Nor did the Court

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[60] Id.

[61] Cook v. Edwards, 314 F. Supp. 307, 311 (D. N.H. 1972).

[62] Sullivan v. Houston Indep. School Dist., 333 F. Supp. 1149, 1172 (S.D. Tex. 1971).

[63] Dixon v. Alabama, 186 F. Supp. 945 (M.D. Ala. 1960), rev'd 294 F. 2d 150, 157 (5th Cir. 1961).

[64] 96 Cal. Rptr. 609, 618 (1971). See Chapter IV, text with note 197, infra, for a discussion of this case.

[65] 411 U.S. 1, 35 (1973).

find any basis for giving education *implied* constitutional protection. In upholding the constitutionality of Texas' financing scheme for public schools, Justice Powell further declared that "the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation."[66]

Although the Court quoted the *Brown* decision at length and cited several other rulings which expressed an "abiding respect for the vital role of education in a free society," it was not moved to afford constitutional protection to education:

> Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that the "grave significance of education both to the individual and to our society" cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.[67]

Thus, by a one vote plurality, the Supreme Court in *Rodriguez* declined to draw education into the inner circle of constitutionally protected rights. Although this decision will be used to support the contention that the right to a public education is not constitutionally guaranteed,[68] the Court's ruling did not definitively settle the issue. By limiting the decision to the validity of Texas' public school financing plan under the equal protection clause, the Supreme Court left open the possibility of a substantive right to education being established in other factual situations. The Court actually hedged on the issue of whether state action which had the *intent* of disequalizing education or totally

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[66] *Id.*

[67] *Id.* at 30.

[68] *See* Chapter IV, text with notes 249, 257, *infra*.

denying educational opportunities to some students could cause education to be viewed as a fundamental right that would receive constitutional protection.[69]

Education as a Protected Property Interest

It can be argued that a more stable constitutional right can be established by judicial declaration that the individual's interest in education is an implied due process 'liberty'. However, the Supreme Court's failure to take a definitive stand on this issue does not eliminate the individual's claim to a right to an education under the due process clause. The student still can assert a 'protected property right' to a public education which cannot be denied by the state without due process of law.

The Supreme Court has recognized that protected property interests usually are "not created by the Constitution. Rather, they are created and their dimensions are defined" by an independent source such as state statutes.[70] Thus, since the state has decided to provide education and has made school attendance mandatory, the student has a legitimate claim of entitlement to a public education. Through state constitutional and statutory provisions, the state has created the expectation that citizens

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[69]See Chapter IV, text with notes 222-45, infra.

[70]Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In this case, the Supreme Court held that a nontenured teacher, who was not rehired by a state university, could not demonstrate sufficient 'liberty' or 'property' entitlement to require constitutional protection of procedural due process prior to the termination of his employment.

are entitled to the benefit of attending school, and this protected property interest cannot be abridged without fair procedures.[71]

In several Supreme Court decisions, the Court has required procedural due process because of the protected property right involved, even though the interest in question has not been afforded explicit protection by the Federal Constitution. For example, the Court has held that when a state has established a welfare program, it has created the expectation of a benefit which cannot be indiscriminately denied without procedural safeguards.[72] Likewise, the Court has ruled that state employees have a legitimate claim to continued employment and may not be discharged without procedural protections.[73] Similarly, in Morrissey v. Brewer, the Supreme Court held that due process must take place before the state can revoke parole since the state has created the expectation of such a right.[74] The state, through statutes and regulations, has established a property interest on the part of the parolee which cannot arbitrarily be denied without violating the fourteenth amendment.

In a recent Supreme Court decision concerning short-term student suspensions, the Court clearly announced that the state "is constrained to recognize a student's legitimate entitlement to a public education as

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[71] See Perry v. Sindermann, 408 U.S. 593 (1972), which was handed down by the Supreme Court on the same day as Roth. In this case, there were sufficient grounds that the nontenured teacher had a legitimate claim of entitlement to his position; thus, the Supreme Court ruled that he deserved procedural due process in order that the grounds for his nonretention could be substantiated or refuted.

[72] Goldberg v. Kelly, 397 U.S. 254 (1970) (Recipients had a legitimate right to a hearing to determine their eligibility for welfare benefits).

[73] Connell v. Higginbotham, 403 U.S. 207 (1971).

[74] 408 U.S. 471 (1972). See also Wolff v. McDonald, 418 U.S. 539 (1974).

as a property interest which is protected by the Due Process Clause."[75] Justice White, writing for the majority in Goss v. Lopez, further elaborated:

> Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred.[76]

The Supreme Court's ruling in Goss is too recent for its impact to be fully realized at this point. However, the Court's definitive declaration that the student has a state-created property interest in public education that cannot be denied without procedural due process may have vast implications for future educational litigation. Perhaps it will encourage the courts to go beyond protecting the student's 'property right' to school attendance and begin requiring fair procedures for pupil placement in instructional programs. Furthermore, this decision may influence the judicial posture in future education controversies based on equal protection grounds and may give students more confidence in asserting their right to at least minimal benefits from their mandatory school experience.

Litigation Involving the Right to Attend Public School

Courts have repeatedly emphasized the grave injury that can result to the child who is excluded from public educational opportunities.[77]

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[75]Goss v. Lopez, 43 U.S.L.W. 4181, 4184 (U.S. Jan. 22, 1975).

[76]Id. at 4183-84. See text with note 135, infra, for further discussion of this case.

[77]This is especially true of federal courts. The preference for federal courts in protecting personal rights seems partly attributable to the traditional deference of state courts to legislatures. Generally the state's delegation of rule-making authority to local school boards is very broad, and most state courts have refused to strike down any rule that is not plainly unrelated to the efficient management of the school. See "Recent Cases," 84 Harv. L. Rev. 1702, n. 2 (1971).

Legal controversies concerning the denial of school attendance to selected students, either for disciplinary reasons or based on characteristics such as marriage or handicaps, are especially salient to this study as these cases focus on the right to public education itself, rather than on other constitutional guarantees which have been infringed.

Married and Pregnant Students' Rights to Education

The individual's right to attend public school has often been addressed in cases involving married and pregnant students. In 1929 the Supreme Court of Kansas ruled that a student could not be denied an education because he was married:

> [I]t is proper also to see that no one within school age should be denied the privilege of attending school unless it is clear that the public interest demands expulsion of such pupils or a denial of his right to attend.[78] [emphasis added]

However, in 1957, the Supreme Court of Tennessee reached the opposite conclusion concerning the right of married students to remain in school. The school officials demonstrated that married students had a detrimental influence on fellow students and the efficiency of the school for the few months after their marriage. Thus, the court upheld the school regulation that required students to withdraw from school for the remainder of the term immediately following their marriage.[79]

In spite of several rulings to the contrary, the prevailing view is that married students must be granted the same right to attend school as

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[78]Nutt v. Bd. of Educ., City of Goodland, 128 Kan. 507, 128 P. 1065 (1929). See also McLeod v. State, 154 Miss. 468, 122 So. 737 (1929).

[79]State v. Marion County Bd. of Educ., 302 S.W. 2d 57 (Tenn. 1957).

unmarried students. In Board of Education of Harrodsburg v. Bentley, the Kentucky Court of Appeals held that the school board could not make marriage, ipso facto, the basis for denial of the student's right to obtain an education.[80] The court found the exclusion of married students to be arbitrary and unrelated to the school's asserted purpose. Similarly, the Texas Court of Civil Appeals ruled that boards of education could not deny admission to school because of a student's marital status.[81]

Since it has generally been accepted that a married student has the right to remain in school, the controversial issue at present concerns the married student's right to participate in extracurricular activities. Traditionally, courts upheld regulations prohibiting married students from participating in extracurricular activities on the basis that teen-age marriages should be discouraged since they contributed to the school dropout problem.[82] The Supreme Court of Utah in 1963 asserted that it was not the role of the courts to rule on the wisdom or social desirability of such regulations. The court reasoned:

> [S]o long as the rules promote the objectives of the school and so long as the standards of eligibility are based upon uniformly applied classifications bearing some reasonable relationship to the objectives, rules will not be set aside as capricious, arbitrary, or unjustly discriminatory.[83]

Likewise, an Ohio regulation barring married students from participating in extracurricular activities was upheld by the common pleas court because school officials demonstrated that married athletes were often in a position

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[80]383 S.W. 2d 677, 680 (Ky. Ct. App. 1964).

[81]Anderson v. Canyon Indep. School Dist., 412 S.W. 2d 387 (Tex. Civ. App. 1967).

[82]Bd. of Directors of Indep. School Dist. of Waterloo v. Green, 259 Iowa 1260, 147 N.W. 2d 854 (1967).

[83]Starkey v. Bd. of Educ. of Davis County School Dist., 14 Utah 2d 227, 381 P. 2d 718 (1963).

to be idolized and copied by other students. Thus, the school's purpose of attempting to discourage underage marriages justified the regulation.[84]

However, several recent cases have challenged the traditional view that married students could be denied participation in extracurricular activities, and courts have held that married students should not be discriminated against in public education. As early as 1960, a majority of the justices on the Michigan Supreme Court voted against the legality of a school board rule which excluded married students from participating on the football team. The Attorney General spoke on behalf of the students that the board's action was punitive and resulted in humiliation of the married students. However, the lower court's decision upholding the regulation was allowed to stand purely on the procedural grounds that the issue was moot since the plaintiffs had graduated.[85]

In Davis v. Meek, an Ohio federal court invalidated regulations which kept married students from participating in extracurricular activities. The court noted that extracurricular activities "are an integral part" of the total school program and that such regulations cut off married students from a portion of the education which they have a right to receive in view of the landmark Brown decision.[86] Similarly, a Montana federal court held that the right to attend school includes the right to participate in extracurricular activities.[87]

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[84]State ex rel. Baker v. Stevenson, 189 N.E. 2d 181 (Ohio C. P. 1962).

[85]Cochrane v. Bd. of Educ. of Mesick Consol. School Dist., 103 N.W. 2d 569 (Mich. 1960) (The court split evenly on whether the issue was moot, id. 576).

[86]344 F. Supp. 298, 301 (N.D. Ohio 1972).

[87]Moran v. School Dist. No. 7, Yellowstone County, 350 F. Supp. 1180, 1186-87 (D. Mont. 1972).

In Holt v. Shelton, the federal court held that school regulations preventing married students from participating in extracurricular activities unconstitutionally infringed upon the student's right to marry and right to attend school.[88] The court observed that "it is strongly arguable that the right to an education is, itself, more than a mere right but a 'fundamental right'."[89] Likewise, in a recent Texas case, the court of civil appeals invalidated exclusion of married students from participation in extracurricular activities on the rationale that once the state established such programs, it could not exclude a certain class of students from participating without showing a compelling state interest.[90]

School regulations which deny pregnant students an education or discriminate against pregnant students are also being questioned in the courts. In 1961, a school rule in Ohio was attacked which required students to withdraw from school immediately upon knowledge of their pregnancy. The common pleas court held that the regulation was not arbitrary, but was a "wise and proper exercise of discretion" to safeguard pregnant students' physical well-being from the "typical rough-and-tumble characteristic of children in high school," with no motivation to punish the child.[91]

Although some regulations have been upheld, at present it appears that the courts will scrutinize any regulation concerning pregnant

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[88] 341 F. Supp. 821 (M.D. Tenn. 1972). [89] Id. at 823.

[90] Bell v. Lone Oak Indep. School Dist., 507 S.W. 2d 636 (Tex. Civ. App. 1974).

[91] State ex rel. Idle v. Chamberlain, 175 N.E. 2d 539, 541-42 (Ohio C.P. 1961).

students unless a direct relationship can be shown to protecting the girl's health[92] or an alternative program more suitable to the student's needs is made available. In 1966, a school rule in Texas was attacked which excluded married mothers from attending regular public school classes. The only alternative available to the excluded students was to attend adult education classes which required a minimum age of twenty-one. Thus, the teenage mothers were totally denied any educational opportunities for several years. The Texas Court of Civil Appeals invalidated the school board policy and held that the students had a right to an education furnished by the state because they were of the age for which the state supplied funds for such purposes.[93]

A Mississippi federal district court invalidated a school board's policy which denied school admission to unwed mothers. The court noted the importance of education and ruled that students could not be excluded from school solely because they were unwed mothers, unless at a fair hearing of the school board it was shown that the students were so lacking in moral character that "their prescence in school will taint the education of others."[94] Similarly, a federal district court in Alabama held that the school board's reasons for excluding pregnant students from school

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[92]In 1972 the Fifth Circuit Court of Appeals upheld mandatory maternity leave two months before delivery in Schattman v. Texas Employment Comm'n, 459 F. 2d 32 (5th Cir. 1972). See also Cohen v. Chesterfield County School Bd., 474 F. 2d 395 (4th Cir. 1973).

[93]Alvin Indep. School Dist. v. Cooper, 404 S.W. 2d 76 (Tex. Civ. App. 1966).

[94]Perry v. Grenada Municipal Separate School Dist., 300 F. Supp. 748, 753 (N.D. Miss. 1969).

were insufficient to deny the plaintiff's constitutional right to obtain an education.[95]

In the leading decision asserting that pregnant students must be treated the same as other students, Ordway v. Hargraves, the Massachusetts district court held that school authorities could not exclude a pregnant, unmarried student from attending regular high school classes.[96] School officials had proposed that Miss Ordway be allowed to use all school facilities, attend school functions, participate in senior activities, and receive assistance from teachers in completing assignments. However, she was not to attend school during regular school hours. Since the school authorities were unable to demonstrate any educational purpose or medical reasons for this special treatment, the court held that Miss Ordway had the right to attend classes with other children. The court explicitly stated:

> It would seem beyond argument that the right to receive a public education is a basic personal right or liberty. Consequently, the burden of justifying any school rule or regulation limiting or terminating that right is on the school authorities.[97] [emphasis added]

Denial of School Attendance in Student Discipline Cases

The collision of the police power of the state with due process guarantees has also occurred in cases involving student suspension and expulsion. Traditionally, courts exercised limited review of school regulations

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[95] In re Anonymous, Civil Action No. 3624-N (M.D. Ala., bench ruling, March 1972), cited in M. McClung, "The Problem of the Due Process Exclusion: Do Schools Have a Continuing Responsibility to Educate Children with Behavior Problems?" 3 J. L. and Educ. 491, 497 (1974).

[96] 332 F. Supp. 1155 (D. Mass. 1971).

[97] Id. at 1158.

and disciplinary procedures, and students were seldom successful in challenging regulation of their conduct.

In 1923 the Arkansas Supreme Court was called upon to review the reasonableness of a school rule forbidding students to wear transparent hosiery, low necked dresses, face paint, or cosmetics. In Pugsley v. Sellmeyer, the court upheld the school regulation and sanctioned the expulsion from school of an 18-year-old girl who insisted on wearing talcum powder on her face.[98] In Mississippi, a regulation of a resident agricultural high school was upheld which sanctioned disciplinary measures against students who failed to wear a specified uniform at school and when visiting public places within five miles of the school, even on Saturdays and Sundays.[99] Also, a school rule was upheld by the Supreme Court of Massachusetts in 1923 which excluded pupils from school because they were found to have head lice.[100] The same year a female Michigan student was suspended for smoking and riding in a car with a young man,[101] and in 1931, a male student in North Dakota was suspended for refusing to remove metal cleats from his shoes.[102]

According to Yudof, there were several reasons for judicial hesitancy to interfere with the administrative authority of school officials in these early cases, First, statutory provisions often granted local school boards wide discretion in determining school rules and regulations, so the courts were not to "supercede the judgment of elected officials" as long as the

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[98]158 Ark. 247, 250 S.W. 538 (1923).

[99]Jones v. Day, 127 Miss. 136, 89 So. 906 (1921).

[100]Carr v. Dighton, 229 Mass. 304, 118 N.E. 525 (1918).

[101]Tanton v. McKanny, 226 Mich. 245, 197 N.W. 510 (1924).

[102]Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1931).

discretion was exercised in good faith. Secondly, any reasonable exercise of power by the school authorities was usually upheld by the courts, so the burden of proving that a particular rule was arbitrary or capricious was clearly on the student. Also, school attendance was thought to be a "privilege bestowed by the state," so the state could attach whatever conditions it pleased. Finally, since school authorities were acting in place of the parents for a certain portion of the day, they were entitled to the same rights as parents to regulate the children's conduct.[103]

Courts have made a quantum leap from the posture in these early cases to the active protection of students' rights espoused in Tinker v. Des Moines: "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect."[104] In Pugsley and similar cases during the first third of the century, the courts did not choose to apply the first and fourteenth amendments and generally abdicated jurisdiction over the internal operations of the schools. Later the "reasonable relationship" test was employed by courts to evaluate school policies, but this still placed the burden of proof on the party attacking the action of school authorities.[105] However, with Tinker, a new era of students' rights

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[103]M. Yodof, "Student Discipline in Texas Schools," 3 J. L. & Educ. 221, 223 (1974).

[104]393 U.S. 503, 511 (1969) (Suspension of students, wearing armbands to protest the Vietnam War, violated their first amendment right to free expression, as they created no 'material and substantial disruption' to the orderly progress of the school).

[105]See generally J. Hogan, supra note 56, Chapter 2.

has emerged, and now stricter judicial scrutiny is being given to actions of school officials.[106] Thus courts are looking closely at the extent to which the infringement is confined to the "legitimate public interest to be served."[107]

The first case to delineate specific procedural requirements for students prior to expulsion or lengthy suspension was Dixon v. Alabama, a higher education case. Since Dixon referred specifically to college students who voluntarily were in school, it could be presumed that even stricter standards of procedural due process would be required to protect the rights of students in public educational institutions since they are compelled to attend. In Dixon, the Fifth Circuit Court of Appeals declared that it "requires no argument to demonstrate that education is vital and, indeed, basic to civilized society."[108] The appellate court also emphasized that if the plaintiffs were denied sufficient education, they "would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens."[109]

The court in Dixon established the following requirements for procedural due process prior to the expulsion of a student for misconduct. First, the student should receive written notice of the charges against him. Also, the student is entitled to a fair hearing, "which gives the Board or the administrative authorities of the college an opportunity to

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[106]"Note, Public Secondary Education: Judicial Protection of Student Individuality," 42 S. Cal. L. Rev. 126, 130 (1969).

[107]Richards v. Thurston, 424 F. 2d 1281, 1284 (1st Cir. 1970).

[108]186 F. Supp. 945 (M.D. Ala. 1960), rev'd 294 F. 2d 150, 157 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961).

[109]Id., 294 F. 2d 157.

hear both sides in considerable detail." The specific circumstances of each case should determine the exact nature of the hearing, but the student should at least be given the names of the witnesses against him "and an oral or written report of the facts to which each witness testifies." The student should have the opportunity to present his own defense against the charges, including witnesses in his behalf. Finally, a report of the proceedings, findings, and results should be made and be available to the student.[110]

In Madera v. Board of Education, the Second Circuit Court of Appeals held that students must be afforded procedural due process before expulsion or removal from the regular school program. The court stated that a guidance conference did not have to meet all aspects of due process since it was not convened to make a final determination concerning the student.[111] Similarly, in Slogin v. Kaufman, the Seventh Circuit Court of Appeals upheld the district court's ruling that students who are facing expulsion must have the opportunity to present their case to an impartial tribunal.[112] The district judge presented the following rationale for this decision:

> I take notice that in the present day, suspension for a period of time substantial enough to prevent one from obtaining academic credit for a particular term may well be, and often is in fact, a more severe sanction than a monetary fine or confinement imposed by a court in a criminal proceeding.[113]

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[110] Id. at 158-59.

[111] 267 F. Supp. 356 (S.D.N.Y. 1967), rev'd 386 F. 2d 778 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968).

[112] 295 F. Supp. 978 (W.D. Wis. 1968), aff'd 418 F. 2d 163 (7th Cir. 1969).

[113] Id., 295 F. Supp. 988.

In Breen v. Kahl, a district court in Wisconsin invalidated student suspensions based on the board's grooming policy, and the federal judge made the following remarks concerning the importance of education:

> I find that to deny a sixteen-year-old eleventh grade male and a seventeen-year-old twelfth grade male access to a public high school in Wisconsin is to inflict upon each of them irreparable injury for which no remedy at law is adequate. I make this finding by taking judicial notice of social, economic, and psychological value and importance today of receiving a public education through twelfth grade.[114]

The court also emphasized that when a school board expels a student, "it is undertaking to apply the terrible organized force of the state, just as surely as it is applied by the police, the courts, the prison warden, or the militia."[115]

In 1969 a federal district court in Michigan declared "that a record of expulsion from high school constitutes a lifetime stigma."[116] The court stressed that when such "drastic action" is contemplated, school officials must at least provide the student the opportunity to plead his case prior to the actual expulsion.[117] Similarly, in Givens v. Poe, the federal district court in North Carolina recognized that suspension or expulsion "deprives a student of important rights and opportunities" and explicitly stated that due process requires a hearing prior to "expulsion

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[114] 296 F. Supp. 702, 704 (W.D. Wis. 1969), aff'd 419 F. 2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970).

[115] Id., 296 F. Supp. 707.

[116] Vought v. VanBuren Public Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969). See Wasson v. Trowbridge, 382 F. 2d 807 (2d Cir. 1967).

[117] Vought v. VanBuren Public Schools, id.

or prolonged suspension from school."[118] In 1972, the Fifth Circuit Appellate Court ruled that if students were suspended without proper procedures, school records had to be expunged of any reference to the unlawful suspensions.[119]

The federal district court in New Hampshire used substantive due process grounds to invalidate the expulsion of a student who arrived at school intoxicated. The court concluded that the student would suffer "psychological and mental harm" from the expulsion and further proclaimed: "No authority is needed for the fundamental American principle that a public education through high school is a basic right of all citizens."[120] Similarly, in 1974, the Fifth Circuit Court of Appeals held that serious disciplinary penalities could violate the "commands of the fourteenth amendment." Judge Godbold, writing for appellate court in Lee v. Macon County Board of Education, noted the personal injury resulting from school expulsion:

> A sentence of banishment from the local educational system is, insofar as the institution has power to act, the extreme penality, the ultimate punishment. In our increasingly technological society getting at least a high school education is almost necessary for survival. Stripping a child of access to educational opportunity is a life sentence to second-rate citizenship. . . .[121]

In Vail v. Board of Education of the Portsmouth School District, the plaintiff high school students had been repeatedly suspended for 'defiant

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[118] 346 F. Supp. 202, 203-205 (W.D.N.C. 1972). This litigation was in progress for over three years before the school board devised suspension-expulsion policies which were approved by the court. See T. Flygare, "Short-Term Suspensions and the Requirements of Due Process," 3 J.L. and Educ. 529, 546-47 (1974).

[119] Pervis v. LaMarque Indep. School Dist., 466 F. 2d 1054 (5th Cir. 1972). See Dunn v. Tyler Indep. School Dist., 460 F. 2d 137 (5th Cir. 1972).

[120] Cook v. Edwards, 341 F. Supp. 307, 311 (D.N.H. 1972).

[121] 490 F. 2d 458, 460 (5th Cir. 1974).

behavior'. Plaintiffs contended that the suspensions violated their fundamental right "to acquire useful knowledge" based on the Supreme Court's ruling in Meyer v. Nebraska. They further alleged that school attendance was a protected interest because it was "a state-granted constitutional right."[122] In balancing the asserted interests of the school officials in maintaining orderly conduct and a "moral atmosphere" against the interests of the students, the New Hampshire district court concluded that suspensions exceeding five days would require a prior hearing and other elements of procedural due process. However, for suspensions lasting less than five days, the court stated that "due process requires at least an informal administrative consultation" so students can have the opportunity to plead their case.[123]

In 1974, the Fifth Circuit Court of Appeals definitively ruled that a school board regulation violated substantive due process guarantees because it allowed students to be suspended from school because of the acts of their parents. The court stressed that since the children were punished without being personally guilty, "a cardinal notion of liberty is involved and substantive due process is applicable."[124] The court concluded that the state demonstrated no compelling interest for its encroachment upon the liberty of the plaintiff students.

In several cases involving student suspension and expulsion, the courts have taken the opportunity to elaborate on the constitutional status of the individual's right to an education. In Alexander v.

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[122] 354 F. Supp. 592, 602 (D.N.H. 1973).

[123] Id. at 603.

[124] St. Ann v. Palisi, 495 F. 2d 423, 426-27 (5th Cir. 1974).

Thompson, a federal district court in California held that public education is a legal right protected by equal protection and due process guarantees of the Constitution and that, at minimum, the denial of public education cannot be arbitrary.[125] Likewise In Crews v. Cloncs, a case involving a school grooming regulation, the Seventh Circuit Court of Appeals held that the "state does not possess an absolute right arbitrarily to refuse opportunities such as education in public schools."[126] In a Fifth Circuit student discipline case, the appellate court recognized that education is a "fundamental right of every citizen" and "plays an extremely significant role" in modern society.[127]

Although general agreement had been reached that students were entitled to some degree of procedural due process prior to expulsion from public school, until the recent Supreme Court ruling in Goss v. Lopez,[128] many questions remained concerning the nature of disciplinary actions which would require procedural safeguards. Standards across the country have varied greatly concerning the length of suspension permitted without a hearing and the types of hearings employed. In Black Students v. Williams, the Fifth Circuit Appellate Court held that a ten-day suspension was of substantial duration to require a due process hearing.[129] In

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[125]313 F. Supp. 1389 (C.D. Cal. 1970).

[126]432 F. 2d 1259, 1263 (7th Cir. 1970).

[127]Williams v. Dade County, 441 F. 2d 299, 302 (5th Cir. 1971). See Woods v. Wright, 334 F. 2d 369 (5th Cir. 1964).

[128]U.S.L.W. 4181 (U.S. Jan. 22, 1975). See text accompanying notes 75, supra; 136, infra.

[129]335 F. Supp. 820 (M.D. Fla. 1972), aff'd F. 2d 957 (5th Cir. (1972). See also Lindwood v. Bd. of Educ., City of Peoria, School Dist. 150, 463 F. 2d 763 (7th Cir. 1972), cert. denied, 93 S. Ct. 475 (1972) (upheld Illinois statute which allowed school boards to suspend students for up to seven days without notice or hearing); Farrell v. Joel, 437 F. 2d 160 (2d Cir. 1971) (due process was not violated by student suspension for ten days without written notice of charges or formal hearing).

Sullivan v. Houston Independent School District, the Texas federal district court held that the school board could not suspend any student for longer than three days without notice and a hearing.[130] However, in subsequent litigation, testing the enforcement of this policy, the Fifth Circuit Court of Appeals ruled that under some circumstances due process was not required for suspensions of more than three days.[131] The district court in Washington D.C. adopted a stricter standard and ruled that a hearing must be held prior to the suspension of any student for a period in excess of two days.[132] One district court has even ruled that all student suspensions, regardless of length, must be preceded by an evidentiary hearing.[133] In contrast, however, the district court in Colorado has upheld suspensions without notice or hearing lasting up to 25 days.[134] With such diversity in standards, it has been very difficult for students to ascertain the perimeters of their rights to procedural due process. No doubt, these circumstances encouraged the Supreme Court finally to agree to deliver an opinion in a case involving short-term student suspensions.

Goss v. Lopez, handed down by the Supreme Court on January 22, 1975, dealt with procedural requirements necessary prior to student suspensions of less than ten days.[135] The case challenged an Ohio statute which

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[130]307 F. Supp. 1328 (S.D. Tex. 1969).

[131]333 F. Supp. 1149 (S.D. Tex. 1970), rev'd in part, 475 F. 2d 1071 (5th Cir. 1973).

[132]Mills v. Bd. of Educ., 348 F. Supp. 866 (1972).

[133]Mello v. School Comm. of New Bedford, C.A. No. 72-1146-F (D. Mass. 1972).

[134]Hernandez v. School Dist. No. 1, Denver, 315 F. Supp. 289 (D. Colo. 1970).

[135]Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973), aff'd sub nom. Goss v. Lopez, 43 U.S.L.W. 4181 (U.S. Jan. 22, 1975).

authorized school boards to suspend students for disciplinary reasons for up to ten days without notice of charges or prior hearing. Plaintiff students, who had been suspended during a period of racial conflict in the Columbus schools, attacked the statute as unconstitutional under fourteenth amendment due process guarantees. The Supreme Court split five to four in striking down the statute. Justice White, delivering the opinion of the Court, stated that the students were unconstitutionally deprived of their property right to education without procedural safeguards.[136] In defining the students' protected property interest in education, the Court relied on the fact that state statutes and regulations concerning education entitled citizens to expect certain benefits. Thus, the Court concluded that the students had "legitimate claims of entitlement to a public education" protected by the due process clause of the fourteenth amendment.[137]

The Supreme Court further held that the students had a constitutionally protected 'liberty interest' in maintaining their reputations free of stigma, which the suspensions without fair procedures violated.[138] Although the state asserted that short-term suspensions were minor penalties, the Supreme Court agreed with the lower court's reasoning that "[i]f education is a protected liberty when expulsion is involved, then it remains a liberty when suspension occurs."[139]

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[136] Id., 43 U.S.L.W. 4182-84. See text accompanying note 71, supra.

[137] Id. at 4183.

[138] Id. at 4184. See Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); text accompanying note 165, infra.

[139] Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973). The National Education Association filed an amici curiae brief on behalf of the students which stated that a student should be granted "detailed procedural rights" for any suspension longer than one day. See T. Flygare, "Two Suspension Cases the Supreme Court Must Decide," Phi Delta Kappan, December, 1974, at 257.

In discussing the type of procedures required for short-term suspensions, the Court announced that the student should be given notice of the charges, an explanation of the evidence against him, and an opportunity to plead his case: "The [due process] clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school."[140] The Court 'stopped short' of requiring counsel for the student and a full-dress hearing with witnesses, and thus left some uncertainties as to the type of informal hearing required. The Court did emphasize, however, that its decision was addressed solely to suspensions lasting less than ten days and that longer suspensions or expulsions "may require more formal procedures."[141]

This analysis of litigation involving procedural requirements for student disciplinary action has important implications for establishing a constitutional right to an education. Since students have a state-created property right to school attendance, guaranteed by the due process

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[140] 43 U.S.L.W. 4183.

[141] Id. at 4187. Another student discipline case recently handed down by the Supreme Court involved the standard of proof necessary in order to suspend a student. It also raised the issue of whether school board members who participated in unlawful student suspensions could be sued personally for damages. The Eighth Circuit Court of Appeals held that the evidence presented against the students was insufficient to warrant suspension and that the students could recover damages from board members if it could be shown that the board members failed to act in good faith. Strickland v. Inlow, 348 F. Supp. 244 (W.D. Ark. 1972), rev'd, 485 F. 2d 186 (8th Cir. 1973), cert. granted sub nom. Wood v. Strickland, 416 U.S. 935 (1974). On February 25, 1975, the Supreme Court decided by a five to four margin that school board members could be sued for damages if they acted without good faith and disregarded the students' clearly established constitutional rights. However, the Court returned the case to the Eighth Circuit Appellate Court to determine whether the students' rights to due process had been violated and thus declined to address the 'standard of proof' issue in this decision. Wood v. Strickland, 43 U.S. L.W. 4293 (U.S. Feb. 25, 1975). This Supreme Court ruling is bound to cause school board members to be more cautious in exercising 'good faith' in all student disciplinary actions.

clause of the fourteenth amendment, procedural safeguards may be required in other school situations in addition to those involving student discipline. For example, erroneous placement of pupils in instructional programs or denial of appropriate educational opportunities to handicapped or other classes of children without fair procedures may be declared constitutionally invalid.

The current emphasis on procedural due process for students also confirms the importance of the educational interest itself. After all, due process of law is evoked only when governmental action threatens to deny the individual of life, liberty or property. The citizen's 'fundamental liberty interest' in protecting his reputation and his 'protected property interest' in attending school are being asserted in a growing body of educational litigation which holds promise for judicially required reform in both equality and quality of public educational opportunities.

Handicapped Children and the Right to Education

The right of every child to receive minimum educational benefits furnished by the state has been asserted in cases involving handicapped children and special education. More than seven million children currently require special educational services, and it has been estimated that nearly one million children are either excluded from public education or denied an education suitable to their needs.[142] The President's Commission on Mental Retardation reported in 1969 that across the country,

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[142] F. Weintraub & A. Abeson, "Appropriate Education for All Handicapped Children: A Growing Issue," 23 Syracuse L. Rev. 1037, 1037-38 (1972). See Pennsylvania Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972).

as many as 60 percent of school age retarded children probably were not receiving an education.[143]

According to Dimond, the constitutional basis for the claim that every child has a right to at least a minimum public education rests on both due process and equal protection grounds.[144] The exclusion of any child from public schooling violates equal protection mandates when the state makes such an opportunity available to other children.[145] Also, the individual's protected property interest in attending public school, guaranteed by the due process clause, is violated when school attendance is denied to these children.[146] In addition, unfair placement procedures which stigmitize the child violate 'liberty' guarantees of the fourteenth amendment.[147] These last two grounds are similar to the rationale used in attacking school practices concerning student suspension and expulsion for disciplinary reasons.

The Supreme Court ruling in Rodriguez can be used to support the contention that the state is required to provide at least some education for all school age children. In upholding the validity of Texas' public school financing plan, Justice Powell explicitly stated that the Court was not dealing with the fundamentality of education in the context of its total denial:

> Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the exercise of either right [voting

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[143]President's Commission on Mental Retardation, MR 69, "Toward Progress: A Story of A Decade," at 18 (1969).

[144]P. Dimond, supra note 53, at 1093.

[145]See Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964); Chapter IV, infra.

[146]See text accompanying notes 75, 136, supra.

[147]See Wisconsin v. Constantineau, 400 U.S. 433 (1971); discussion accompanying note 165, infra.

> and free speech], we have no indication that the present levels of educational expenditure in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where--as is true in the present case--no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.[148]

The Rodriguez majority also noted that in other cases where strict judicial scrutiny had been applied, legislation was involved which "deprived, infringed, or interfered" with the exercise of some fundamental right or liberty. However, the Texas system of school financing did not serve to deny education to anyone, but was "implemented in an effort to extend public education and to improve its quality."[149] The fact that the benefits were distributed unevenly did not convince the Court that the financing plan was unconstitutional. Hence, the Supreme Court at least inferred that the total denial of educational opportunities to some citizens might have been viewed as deprivation of a fundamental right or liberty.

In Pennsylvania, a class action on behalf of all retarded persons between the ages of six and twenty-one who were excluded from public education was brought as a civil rights action under the Civil Rights

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[148] 411 U.S. 1, 36-37 (1973). See Chapter IV, text accompanying note 227, infra, for further discussion of the case.

[149] Id. at 37-39.

Act of 1871.[150] In a consent agreement, the three-judge panel held that no such child could be denied admission to a public school program or have his educational status changed without procedural due process of law.[151] The parties agreed with the expert testimony that all mentally retarded persons were capable of benefiting to some degree from an educational program. Thus, the state was declared obligated to place each "mentally retarded child in a free, public program of education and training appropriate to the child's capacity."[152]

The agreement in Pennsylvania Association For Retarded Children v. Commonwealth included the following points:

1. Established a "zero reject" system of free public education and training for mentally retarded persons between the ages of six and twenty-one years.

2. Provided that no child's educational assignment could be changed without notice to the parents or guardians and the opportunity for a hearing regarding the appropriateness of the recommended change.

3. Established that every retarded child could benefit from an educational program regardless of the traditional label based on intelligence quotients that had been applied to the child.

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[150] 42 U.S.C. Sections 1981, 1983. Section 1983 of Title 42 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[151] P.A.R.C. v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972).

[152] Id. at 285.

4. Established that the mental age of a 5-year-old could only apply as a criterion for children entering first grade and could not apply to children entering special classes.

5. Compelled parents to place retarded children between the ages of eight and seventeen in a school program.

6. Permitted parents to enroll a mentally retarded child in school prior to age eight and to keep him in school beyond the age of seventeen.

7. Made public preschool programs available to mentally retarded children prior to age six wherever there were public preschool programs for 'normal' children.

8. Expanded the term 'brain damaged' to include all mentally retarded children.

9. Declared that a mentally retarded child could receive a minimum of five hours per week of homebound instruction and provided that homebound instruction was considered the least desirable alternative to a classroom situation and must be reevaluated not less than every three months.

10. Required the retarded child to be placed in a public program of education and training appropriate to the child's capacity and established that placement in a regular class was preferable to a special class, and placement in a special class was preferable to any other type of program.

11. Required the Department of Education within 30 days of the agreement to submit a satisfactory plan to identify, locate, notify, and evaluate all retarded children in Pennsylvania, and within 90 days to have implemented the plan.

12. Required the Department of Education to submit a plan for the education and training of all mentally retarded persons by February 1, 1972 and to have implemented the plan by September 1, 1972.[153]

A Washington, D.C. case, Mills v. Board of Education, followed the principle established in the Pennsylvania agreement, and expanded the right to an individually appropriate public education beyond the mentally retarded, to all other children alleged to be suffering from mental, behavioral, emotional, or physical deficiencies.[154] Since the Mills ruling was based on a constitutional issue, it established stronger legal precedent than the consent agreement issued in Pennsylvania.[155] Judge Waddy ruled in Mills that the plaintiffs had a constitutional right to an education based on the due process clause of the fifth amendment. He stated for the court that not only were these students denied an equal state supported education while such opportunities were provided to other children, but also some students were totally excluded, suspended, or reassigned to special classes without procedural safeguards. The court definitively held:

> [N]o child eligible for a publicly supported education in the District of Columbia public schools shall be excluded from a regular public school assignment . . .

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[153]Information Sheet distributed by Pennsylvania Association for Retarded Children, cited in R. White, "Right to Education Civil Action No. 71-42," Eric Reports, ED 082 394, December, 1972.

[154]Mills v. Dist. of Columbia Bd. of Educ., 348 F. Supp. 866 (D. D.C. 1972).

[155]P. Friedman, "Mental Retardation and the Law: A Report on the Status of Current Court Cases," Eric Reports, ED 084 756, April, 1973, at 32.

> unless such child is provided . . . adequate alternative educational services suited to the child's needs. . . .[156]

The court in Mills also stressed that the public interest in conserving funds could not justify the denial of education to a certain class of students. If sufficient funds were not available to finance all the needed services and programs, then the court reasoned that available "funds must be expended equitably in such manner that no child is entirely excluded from a publicly supported education."[157] Judge Waddy also stated that the inadequacies of a state's system of public schools, whether caused by insufficient funding or administrative inefficiency, "certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the 'normal' child."[158]

Litigation Involving the Right to Appropriate Placement

It cannot be contested that the total denial of public educational opportunities to certain children can result in grave injury to the individuals involved. In addition, several recent cases have claimed injury to the student due to erroneous placement in instructional programs that deny the pupil educational benefits to which he is entitled. The compulsory nature of schooling combined with the individual's 'inherent liberty' to remain free from arbitrary governmentally imposed stigma and his 'protected property interest' in education forms the basis for the individual to assert a right to correct diagnosis and placement in instructional programs that offer him at least minimal educational benefits.

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[156] 348 F. Supp. 866, 878 (1972).

[157] Id. at 867.

[158] Id.

Inadequate Placement Procedures as a Due Process Violation

The increasing diversity among students in intelligence, background, and ability has encouraged school authorities to classify students for placement in special instructional programs. Most school districts throughout the United States use standardized tests for placement purposes at least once from grades one through twelve,[159] and various other types of tests also are used to make such determinations.

Several recent cases have alleged that children were being placed erroneously in special classes or ability tracks. In Hobson v. Hansen the federal district court invalidated the track system used in Washinton, D.C., and agreed with the plaintiffs that the envisioned flexibility of the system was not evident since intertract mobility was extremely low. Judge Wright announced that the court should guarantee the adherence to fair procedures in assigning students to various programs, but that it was not the role of the court to determine the type of program suitable for each child.[160]

In California, a group of black pupils who had been placed in educable mentally retarded classes were shown upon retesting to have I.Q. scores of 17 to 38 points above the scores they received when tested by school psychologists.[161] In fact, children with normal intelligence were being placed and educated as mentally retarded students. The federal district court concurred with the allegations that the students had been

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[159]"Legal Implications of the Use of Standardized Ability Tests in Employment and Education," 68 Colum. L. Rev. 691, 736 (1968).

[160]269 F. Supp. 401, 492-93 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969). See Chapter IV, text with note 314, infra.

[161]Larry P. v. Riles, 343 F. Supp. 1310 (N.D. Cal. 1972).

wrongly placed in classes for the mentally retarded as a result of culturally biased tests. Furthermore, the plaintiffs claimed that the erroneous placement doomed the children to a lifetime of illiteracy and public dependency.[162] In a similar Boston case, 50 percent of the black, indigent, and Spanish-speaking children who had been placed in special classes were found to be normal upon reexamination by sound methods of diagnosis.[163]

Tracking students or labeling them as retarded, emotionally disturbed, or slow has been attacked in the courts as creating a stigma on the child in violation of the 'liberty' guarantees of the due process clause.[164] The Supreme Court ruling in Wisconsin v. Constantineau can be used to supply the legal precedent that procedural fairness is necessary involving any state action which affixes a stigma on an individual.[165] In Constantineau, the police posted a notice in all retail liquor establishments denying the sale of liquor to Ms. Constantineau because of her excessive drinking. Ms. Constantineau was not given notice or prior hearing concerning the police action. Although the

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[162]Id. at 1315. See Chapter IV, text accompanying notes 322, 336-46, infra, for a discussion of this topic and equal protection mandates.

[163]Stewart v. Phillips, Civil Action No. 70-1199-F (D. Mass., filed Oct. 1970) (motion to dismiss denied and submission of plan required by Feb. 8, 1971). See A. Abeson, "A Continuing Summary of Pending and Completed Litigation Regarding the Education of Handicapped Children Number 7," Eric Reports, ED 085 930, November, 1973, for a discussion of similar litigation in progress in other states. See also, P. Friedman, supra note 155.

[164]See Chapter IV, text accompanying notes 314-22, infra, for a discussion of labeling students according to ability and equal protection guarantees.

[165]400 U.S. 433 (1971).

facts of this case did not involve a school situation, the rationale is applicable:

> The only issue present here is whether the label of characterization given a person by 'posting', though a mark of illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the district court that the private interest is such that those requirements of procedural due process must be met.[166]

In both the Pennsylvania and Washington, D.C. cases involving retarded children, the courts determined that no child should be labeled or recommended for special classes without a "constitutionally adequate prior hearing and periodic review of the child's status, progress and the adequacy of any educational alternatives."[167] In holding that no child could be suspended from public education classes for more than two days without a hearing, Judge Waddy further elaborated in Mills:

> Not only are plaintiffs and their class denied the publicly supported education to which they are entitled, but many are suspended or expelled from regular schooling or specialized instruction or reassigned without any prior hearing and are given no periodic review thereafter. Due process of law requires a hearing prior to exclusion, termination or classification into a special program.[168]

It can be concluded that the student's protected interest in education requires procedural safeguards prior to his assignment to special programs and further requires regular reevaluation of the student's status. Some courts have held that students' records must be expunged of statements made concerning student placement in the absence of fair

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[166] Id. at 436.

[167] Mills v. Bd. of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972). See P.A.R.C. v. Commonwealth, 343 F. Supp. 279, 293 (E.D. Pa. 1972).

[168] Mills, id. at 875.

procedures.[169] Although procedural safeguards cannot insure 'quality education', they can focus public and professional attention on the entire system of delivering educational services. Dimond has remarked that this "self-analysis forced upon public policy makers, teachers, families, and students by procedural fairness in the school classification process insures that schools will begin to attend precisely to real rather than imagined needs."[170]

The Right to Suitable Instructional Programs

If the line of reasoning is followed that the student's 'protected property interest' in education precludes school authorities from totally denying an education to the student, and the student's 'fundamental liberty interest' in remaining free from arbitrary stigma requires fair procedures in placing the student, then it can be deduced that the student also has a constitutionally protected right to expect at least minimum educational benefits to accrue from the lengthy intervention of schooling in his life. The cases enforcing the constitutional right of civilly committed mental patients to receive adequate treatment can be used as a legal basis for this claim, as both civil commitment and compulsory education limit the liberty of the individual.

In Martarella v. Kelly, the New York district court ruled that New York City youths held in long-term detention had a right to effective treatment. Judge Lasker presented the following rationale:

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[169] See Mills, id.; P.A.R.C. v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972).

[170] P. Dimond, supra note 53, at 1119.

> There can be no doubt that the right to treatment, generally, for those held in noncriminal custody (whether based on due process, equal protection or the Eighth Amendment, or a combination of them) has now been recognized by the Supreme Court, the lower federal courts, and the courts of New York.[171]

McClung has claimed that the right to treatment is the quid pro quo for involuntary civil commitment. He has further contended: "Not only is there a right to treatment, but that right has sufficient substantive force to allow a court to inquire into the adequacy of the treatment."[172] An analogy can be drawn between the civilly committed patient and the student who is compelled to attend school. If the patient has the right to appropriate treatment to justify his involuntary confinement, it can be argued that the public school student is entitled to an appropriate educational experience in order to justify his compulsory (perhaps involuntary) attendance. Judge Waddy, in Mills, observed that "requiring parents to see that their children attend school under pain of criminal penalities presupposes that an educational opportunity will be made available to the children."[173]

In Wyatt v. Stickney, defendants sought to prove that treatment of involuntary patients in mental institutions was not an issue capable of definition and resolution by the court. However, the plaintiffs found it quite possible to develop "judicially ascertainable and manageable standards," and the court ruled that education suited to the needs of the children and young adults was specifically included as one of the

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[171]349 F. Supp. 575, 599 (S.D.N.Y. 1972).

[172]M. McClung, "Do Handicapped Children Have a Legal Right to Minimally Adequate Education?" 3 J. L. & Educ. 162 (1974).

[173]Mills v. Bd. of Educ., 348 F. Supp. 866, 874 (D.D.C. 1972).

minimum constitutional standards for adequate treatment of the mentally ill.[174] The court concluded that the educational program must be "compatible with the patient's mental condition and his treatment program, and otherwise be in the patient's best interest."[175]

The district court in Wyatt also recognized the punitive nature of the hospital for civilly committed patients if effective treatment is lacking. Adequate treatment is constitutionally required, reasoned the court, because in its absence, "the hospital is transformed into a penitentiary."[176] Although it is not the purpose of this study to compare public schools to prisons,[177] the analogy can be drawn that when certain students are offered little more than custodial care, even though their attendance is required, the school experience can become punitive and harmful in nature.

In Rouse v. Cameron, the Washington, D.C. Circuit Court commented concerning the treatment that must be provided for patients:

> The hospital need not show that the treatment will cure or improve him but only that there is a bona fide effort to do so. This requires the hospital to show that initial and periodic inquiries are made into the needs and conditions of the patient with a view to providing suitable treatment for him, and that the program provided is suited to his needs.[178]

The court also noted that the lack of finality in scientific judgment "cannot relieve the court of its duty to render an informed decision."[179]

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[174] 325 F. Supp. 781, 785-86 (M.D. Ala. 1971).

[175] Id.

[176] Id. at 784.

[177] In several cases, school regulations have been compared to rules regulating the actions of inmates in prisons. See Brooks v. Wainwright, 428 F. 2d 655 (5th Cir. 1970); Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969).

[178] 373 F. 2d 451, 456 (D.C. Cir. 1966).

[179] Id. at 457.

In a Florida case, Donaldson v. O'Conner, for the first time a former mentally ill person was permitted to sue for being unconstitutionally deprived of his liberty without receiving treatment. The court held for the plaintiff and assessed damages personally against the superintendent of the hospital and his treating physician. In instructing the jury, the court stated:

> [A] person who is involuntarily civilly committed to a mental hospital does have a constitutional right to receive such individual treatment as will give him a realistic opportunity to be cured or to improve his or her mental condition.[180]

Since at least some courts have ascertained manageable standards to use in evaluating the adequacy of treatment for civilly committed patients,[181] it appears conceivable that educators could develop similar criteria for determining the adequacy of public educational programs for pupils. Also, since the 'right to appropriate treatment' has been elevated to constitutional status by several courts,[182] perhaps the judiciary will follow suit by requiring appropriate instructional programs for all students attending public schools. Although students are not yet claiming an unconstitutional denial of their liberty due to

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[180]Civil Action No. 1693 (E.D. Fla., Nov. 28, 1972). See P. Friedman, supra note 155, for further discussion of 'right to treatment' litigation.

[181]It should be noted that in Burnham v. Dep't of Public Health, 349 F. Supp. 1335 (N.D. Ga. 1972), a federal district court in Georgia rejected the Wyatt rationale and held that there was no constitutional right to treatment. The court further concluded that even if there were such a right, courts were not suited to enforce it. Although the Supreme Court has not ruled directly on the issue of the right to treatment, it did declare in Jackson v. Indiana, 406 U.S. 715, 738 (1972) that when a person is confined under commitment procedures, due process requires that the nature and duration of confinement bear some reasonable relationship to its purpose.

[182]See notes 174, 178, 180, supra.

compulsory schooling which does not provide adequate benefits to the learner, some students are asserting their right to an educational program suited to their needs.

In a recent case, Chinese students claimed that the San Francisco public school program failed to provide for the needs of the non-English-speaking students in violation of the equal protection clause of the Constitution and Section 601 of the Civil Rights Act of 1964.[183] Both the district court and the Ninth Circuit Court of Appeals rejected the plaintiffs' claim. The court of appeals recognized that each student brought to school different advantages and disadvantages "caused in part by social, economic, and cultural background." However, the court reasoned that simply because some of these disadvantages could be overcome by providing special programs for the students, the provision of such services by the school board was not constitutionally required. The appellate court further elaborated:

> However commendable and socially desirable it might be for the School District to provide special remedial educational programs to disadvantaged students in those areas, or to provide better clothing or food to enable them to more easily adjust themselves to their educational environment, we find no constitutional or statutory basis upon which we can mandate that these things be done.[184]

However, the Supreme Court reversed the Ninth Circuit Court of Appeals and held that the inadequate programs violated Section 601 of the Civil Rights Act of 1964. The Court clearly stated: "Under these state-imposed standards there is not equality of treatment merely by

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[183] Lau v. Nichols, 483 F. 2d 791 (9th Cir. 1973), rev'd 414 U.S. 563 (1974).

[184] Id., 483 F. 2d 791, 798 (9th Cir. 1973).

providing students with the same facilities, text books, teachers, and curriculum. . . ."[185] The Court also acknowledged that "basic English skills are at the very core of what these public schools teach," and that students "who do not understand English are effectively foreclosed from any meaningful education."[186] The Court concluded that requiring students to acquire English skills on their own before they can hope to make any progress in school "is to make a mockery of public education."[187]

This case raised several relevant issues concerning the individual's right to an education. It went beyond the mere right of the child to be in school and addressed the suitability of the program to the needs of the child. In light of this case, provision of little more than custodial care for some students (e.g., handicapped or non-English-speaking children), which offers no minimal benefit to the individual, would be declared unacceptable by the courts. The Supreme Court also inferred that because education is state-imposed, the program provided must be relevant to the needs of the student in order to meet constitutional mandates.

Evolving Due Process Standard of Review

A constant problem facing the Supreme Court has been the search for a constitutional test which would leave legislatures the flexibility to develop practical solutions to their problems while at the same time allow judicial intervention when necessary to protect the individual's

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[185] Id., 414 U.S. 563, 566 (1974).
[186] Id.
[187] Id.

rights from arbitrary governmental action. The Court has used both due process and equal protection review in its attempt to balance individual interests and governmental power, but it has found neither doctrine to be totally satisfactory.

Substantive due process review was used widely during the first third of the twentieth century, but it fell into disrepute because of its connection with protecting business practices from state legislation.[188] By the 1960s, equal protection review generally had replaced substantive due process, even in litigation concerning individual rights. However, the recent disenchantment with the pitfalls of equal protection standards of review[189] has caused the Court to revive the use of due process to invalidate discriminatory state legislation. Nowak has asserted that the reason for the return to due process has been the Court's failure to delineate clear criteria for evaluating legislation under the equal protection clause.[190]

The due process analysis used during the last few terms by the Supreme Court involves the unconstitutionality of state action which creates 'irrebuttable presumptions' about individuals or classes of individuals. If the presumption is neither necessarily nor universally true and concerns the protected areas of life, liberty or property,[191]

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[188]Lockner v. New York, 198 U.S. 45 (1905). For a discussion of due process and application of the Lockner doctrine, see "Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to LaFleur," 62 Geo. L.J. 1173 (1974).

[189]See Chapter IV, text accompanying notes 361-412, infra.

[190]J. Nowak, "Realigning the Standards of Review Under the Equal Protection Guarantee--Prohibited, Neutral, and Permissive Classifications," 62 Geo L.J. 1071 (1974).

[191]Vlandis v. Kline, 412 U.S. 411, 452 (1973).

the individual is denied due process of law when he is given no opportunity to disprove the presumption. This type of due process analysis emphasizes the procedural safeguards guaranteed to the individual, and thus attempts to avoid some of the hazards associated with substantive due process review.[192]

A brief analysis of several cases, where the Supreme Court has chosen to employ the due process 'irrebuttable presumption' doctrine in preference to equal protection, is salient to this study for at least two reasons. First, it supplies a framework in which to view the current judicial attempts to protect individual interests from arbitrary governmental interference. Secondly, it allows comparisons to be made between interests protected by the Supreme Court using this doctrine and educational interests, thus providing an indicator of the future scope of due process analysis in establishing a constitutional right to education. Therefore, if state legislation concerning education creates 'irrebuttable presumptions' about certain groups of students, the Supreme Court may find the state action invalid without applying equal protection guarantees.

Litigation Involving 'Irrebuttable Presumptions'

As early as 1965, the Supreme Court invalidated Texas legislation which deprived all servicemen of the opportunity to vote in state elections on the assumption that they were not bona fide residents. The legislation was held unconstitutional because it forbade "a soldier ever

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[192]See "Irrebuttable Presumptions," supra note 188, at 1119.

to controvert the presumption of nonresidence."[193] The Court thus required the state to assess each serviceman's claim to residency on an individualized basis. As with several other cases invalidating legislation under the 'irrebuttable presumption' due process doctrine, the statute in this case was also declared repugnant on equal protection grounds.

In Stanley v. Illinois the Supreme Court held that unwed fathers were entitled to a hearing concerning their competency to have custody of their children.[194] The irrebuttable presumption that all unmarried fathers were incompetent to raise their children violated due process procedural guarantees. Although the Court admitted that perhaps most unmarried fathers were unsuitable parents, it could not assume that all unmarried fathers would belong in this category.[195] Furthermore, the Court held that the state's interest in economy could not justify the unconstitutional denial of fair procedures for determining whether any specific unmarried father was fit to have custody of his child.

In Vlandis v. Kline the Supreme Court used the due process clause to invalidate a Connecticut statute which barred college students from becoming in-state residents for tuition purposes if they were nonresidents prior to application for admission.[196] The Court concluded that students

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[193]Carrington v. Rash, 308 U.S. 89, 96 (1965).

[194]405 U.S. 645 (1972).

[195]Id. at 654. The statute in question also violated equal protection guarantees. See Chapter IV, text accompanying note 393, infra.

[196]412 U.S. 441 (1973). See Bell v. Burson, 402 U.S. 535 (1971) (Georgia legislation, which allowed suspension of drivers' licenses without proof of the presumption that there was fault in driving, was invalidated on due process grounds).

who became bona fide residents of the state after enrollment were unconstitutionally denied procedural safeguards to ascertain their residency status:

> [I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination.[197]

The case of United States Department of Agriculture v. Murry involved the constitutionality of a statute which denied food stamps to any household containing a member over 18 years of age who had been claimed as a dependent child by a taxpayer of an ineligible household.[198] Justice Douglas stated for the Court that the statute created an irrebuttable presumption which was often contrary to actual fact. Thus, the plaintiffs were unconstitutionally denied the opportunity to disprove the presumption that households containing 18-year-old tax dependents were likely to defraud the government.[199] It should be noted that in a case decided on the same day as Murry, the Supreme Court used the equal protection clause to invalidate a federal law which denied food stamps to any household containing an individual unrelated to any other member of the household.[200] Although Justice Marshall found the classifications used in the cases to be quite similar,[201] a majority of the Court chose to apply different doctrines for analysis in the two cases.

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[197] Id., 412 U.S. 452.

[198] 413 U.S. 508 (1973).

[199] Id. at 513-14.

[200] United States Dep't. of Agriculture v. Moreno, 413 U.S. 528 (1973). See Chapter IV, text accompanying note 400, infra.

[201] 413 U.S. 508, 517 (1973) (Marshall, J., concurring).

The Supreme Court also used due process to strike down the constitutionality of school board rules which required pregnant teachers to take maternity leave without pay several months before term.[202] Justice Stewart spoke for the majority in Cleveland Board of Education v. LaFleur that the regulations created an irrebuttable presumption that all pregnant teachers were unable to work after a certain point in pregnancy. Although the lower courts had decided the case on equal protection grounds,[203] the Supreme Court held that decisions concerning marriage and family life are included in the due process guarantee of 'liberty'.

Criticism of the 'Irrebuttable Presumption' Doctrine

The Supreme Court's revival of due process review, clothed in 'irrebuttable presumptions', has not occurred without criticism. Justice Rehnquist, dissenting in LaFleur, called the irrebuttable presumption analysis a step backward to the days of "ad hoc judicial determination."[204] He claimed that this type of analysis could invalidate laws prescribing age limits for voting, drivers' licenses, the sale of alcoholic beverages, and mandatory retirement.[205]

Although Justice Powell joined in the opinion of the Court in Vlandis and concurred in the result in LaFleur, he indicated concern about

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[202]Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

[203]LaFleur v. Bd. of Educ., 326 F. Supp. 1308, 1213-14 (N.D. Ohio 1971) (regulation meets reasonable basis test), rev'd 465 F. 2d 1184 (6th Cir. 1972) (regulation discriminates on the basis of sex).

[204]LaFleur, 414 U.S. 632, 654-55 (1974) (Rehnquist, J., dissenting).

[205]Id.

the implications of the 'irrebuttable presumption' doctrine for legislative power to operate by classification:

> As a matter of logic, it is difficult to see the terminus of the road upon which the Court has embarked under the banner of 'irrebuttable presumptions'. If the Court nevertheless uses 'irrebuttable presumption' reasoning selectively, the concept at root often will be something else masquerading as a due process doctrine. That something else, of course, is the Equal Protection Clause.[206]

In his dissent in Vlandis v. Kline, Chief Justice Burger also compared 'irrebuttable presumption' review to equal protection and voiced his fears concerning the Court's revival of due process analysis. In asserting that the Court was "engrafting" the close judicial scrutiny test onto due process review, he stated:

> The doctrinal difficulties of the Equal Protection Clause are indeed trying, but today the Court makes an uncharted drift toward complications for the Due Process Clause comparable in scope and seriousness with those we are encountering in the equal protection area.[207]

Future Directions for Due Process Review

In its search for the proper role between judicial intervention and abstention, the Supreme Court will no doubt continue to strictly scrutinize state action, whether it is via the equal protection clause or the due process clause. Even though some members of the judiciary fear the 'irrebuttable presumption' doctrine, in view of the current

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[206] Id. at 652 (Powell, J. concurring).

[207] 412 U.S. 441, 462 (1973) (Burger, C.J., dissenting). See Press v. Pasadena Indep. School Dist., 326 F. Supp. 550, 565 (S.D. Tex. 1971), where Judge Noel objected to the use of due process in reviewing the reasonableness of a school dress regulation: "Are we to return to the discredited concepts of substantive due process and brazenly substitute its educational policy preference of its taste in dress for the judgment of a legislature or school board which is directly answerable to the electorate? To pose such questions is to answer them--they are simply not the stuff of constitutional law."

controversy over equal protection standards, it seems likely that due process will continue to be revived. Although Justice Marshall has stated a preference for equal protection analysis, he recently noted the similarity of the two doctrines and suggested that the elements of fairness should not be so rigidly classified.[208] Actually, the 'irrebuttable presumption' approach, with its emphasis on invalidating unsubstantiated assumptions about classes of individuals, contains similar reasoning to the emerging equal protection standard of review, which focuses on striking down discriminatory governmental classifications based on neutral criteria such as a person's status at birth.[209]

Kurland has remarked that due process analysis is preferable to equal protection review in areas such as education, where an attempt is being made to "establish minimum standards that are worthy of our society or the society to which we aspire."[210] According to Kurland, the courts should be guaranteeing a minimum level of education for all, rather than mandating equal education, especially if 'equality' could mean universal substandard opportunities. He has further suggested that if such educational standards were established, the distribution of services could be made according to need (i.e., preferential treatment in some cases), instead of according to equality of treatment.[211]

Due to the philosophical split on the Supreme Court, it is difficult to make predictions concerning the Court's future direction in using due

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[208]United States Dep't of Agriculture v. Murry, 413 U.S. 508, 517 (Marshall, J., concurring). He also observed that one aspect of due process is that persons similarly situated must be treated similarly by the government, id.

[209]See generally Chapter IV, infra.

[210]P. Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," 35 U. Chi. L. Rev. 583, 588 (1968).

[211]Id.

process guarantees to invalidate arbitrary state legislation. However, if the Court continues to focus on procedural safeguards required when states create 'irrebuttable presumptions' or impair 'protected property interests', the outlook for constitutional protection of the individual's interests in education may be brighter than it seemed just two years ago.[212]

Bill of Rights Guarantees and Education

As discussed previously, the fourteenth amendment has been judicially interpreted to protect the guarantees of the Bill of Rights against arbitrary state action. If it could be established that education is encompassed in the protections of one of the first nine amendments, then automatically education would receive protection as a substantive 'liberty' under the fourteenth amendment. A discussion of due process guarantees, therefore, would not be complete without a brief analysis of education's relationship to relevant amendments in the Bill of Rights. Two of these amendments hold some promise for future judicial efforts to establish a firm constitutional right to a public education.

Ninth Amendment Rights and Education

Although many state laws have been attacked through the fourteenth amendment as violating guarantees included in the Bill of Rights, the ninth amendment rarely has been called upon as a rationale in legal

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[212] See Rodriguez, 411 U.S. 1, 35 (1973), where the Supreme Court held that education was not among the rights afforded constitutional protection.

contests. In fact, the Supreme Court has never based a ruling on the ninth amendment.[213] This amendment reads as follows:

> The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.

Justice Douglas observed in a dissenting opinion in 1971 that rights, not explicitly stated in the Constitution, "have at times been deemed so elementary to our way of life that they have been labeled as basic rights."[214] He further suggested that education may be one of the basic rights retained by the people under the ninth amendment:

> There is, of course, not a word in the Constitution . . . concerning the right of people to education or to work or to recreation by swimming or otherwise. Those rights, like the right to pure air and pure water, may well be rights "retained by the people" under the Ninth Amendment.[215]

It is contended that the inclusion of the ninth amendment in the Bill of Rights substantiates that the original framers of the Constitution did not want to restrict personal rights to those specifically enumerated in the first eight amendments. Justice Goldberg, concurring in Griswold v. Connecticut, discussed at length the ninth amendment and its relationship to fourteenth amendment limitations on state action:

> In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the

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[213] See "Comment, Ninth Amendment Vindication of Unenumerated Fundamental Rights," 42 Temp. L.Q. 46 (1968). It should be noted that in Roe v. Wade, 410 U.S. 113 (1972), the Supreme Court mentioned in dicta that the right to privacy may be included in ninth amendment as well as fourteenth amendment guarantees.

[214] Palmer v. Thompson, 403 U.S. 217, 233-37 (1971) (Douglas, J. dissenting).

[215] Id. at 233-34.

> Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.[216]

Although the Supreme Court has avoided dealing directly with ninth amendment guarantees, the possibility remains that a future decision may afford constitutional protection to 'the right to education' under this amendment.

First Amendment Rights and Education

The past few decades have witnessed a change in the Supreme Court's posture toward protecting the individual's interests when they conflict with the state's police power over public schools. This has been particularly true in judicial protection of first amendment rights of students and teachers and enforcement of the corresponding duties upon school officials. As indicated early in this chapter, substantive due process 'liberties' have been interpreted to prohibit discriminatory state action concerning the individual's first amendment freedoms.[217] Formerly, the party attacking a school regulation had to bear the burden of proving that the school's action was unreasonable. Now, however, if a constitutional right is alleged to have been impaired, the burden of proof shifts to the state or to its agent, the school.

A brief discussion of several school cases involving first amendment guarantees is relevant to the issue of an individual's right to an education for the following reasons. First, the Supreme Court has taken the opportunity in several of these cases to elaborate on the importance of public education to society and the individual. Also, these cases point out the close nexus between education and the exercise

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[216] 381 U.S. 479, 493 (1965) (Goldberg, J., concurring).

[217] See note 17, supra.

of first amendment freedoms. Finally, these cases supply the legal rationale for the contention that the right to an education is included in the rights protected by the first amendment.

In several cases involving first amendment religious freedoms, the Supreme Court has elaborated upon the vital role education plays in a democratic society. In West Virginia State Board of Education v. Barnette, students were expelled from school due to their refusal to salute the American flag because it violated their religious convictions. The Supreme Court ruled that the expelled children were unconstitutionally deprived of the benefits of the state's public education. Justice Jackson wrote for the Court:

> The Fourteenth Amendment, as now applied to the States, protects the citizens against the State and all of its creatures--Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[218]

In Zavilla v. Masse, the Supreme Court of Colorado likewise invalidated the expulsion of pupils from public school due to their exercise of religious convictions. The court stated that the meaning of due process 'liberties' is "broad enough to protect one from governmental interference in the exercise of his intellect, in the formation of opinions, in the expression of them, and in action or inaction dictated by his judgment or choice."[219]

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[218] 319 U.S. 624, 637 (1943).

[219] 112 Colo. 1831, 147 P. 2d 823, 827 (1944).

Supreme Court Justice Frankfurter, concurring in McCollum v. Board of Education, described the public school as "the most powerful agency for promoting cohesion among heterogeneous democratic people."[220] He further remarked that "the public school is at once the symbol of our democracy and the most persuasive means for promoting our common destiny."[221] In concurring with the Supreme Court decision that declared Bible reading in the public schools to be unconstitutional, Justice Brennan stated:

> Americans regard the public school as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom.[222]

In Epperson v. Arkansas, the Supreme Court invalidated a state statute which banned the teaching of Darwin's theory of evolution. The Court reasoned that the conflict of Darwin's theory with a particular religious doctrine was not a sufficient reason to curtail the knowledge made available to students.[223] The Court cited the decision in Meyer v. Nebraska and reasoned that in both Meyer and Epperson the state's purpose of prescribing the curriculum was not adequate to support the restriction upon the liberty of the teacher and the pupil.[224]

The right of the individual to know and to learn has been discussed often by the courts. As early as 1939 the Supreme Court made the following comments about freedom of discussion:

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[220] 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

[221] Id.

[222] School Dist. of Abington Township v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

[223] 393 U.S. 97 (1968).

[224] Id. at 105.

> Freedom of discussion if it would fulfill its historic function in the nation, must embrace all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period.[225]

More recently, Justice Douglas, concurring in Eisentadt v. Baird, quoted Milton who said in Areopagitica: "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."[226]

Justice Fortas stated in Shelton v. Tucker: "The vigilant protection of constitutional freedoms in nowhere more vital than in the community of American schools."[227] Similarly, in Keyishian v. Board of Regents, the Court declared:

> [T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom. The classroom is peculiarly the "marketplace of ideas."[228]

In Sweezy v. New Hampshire, the Supreme Court protected the academic freedom of professors and elaborated on the vital role that "those who guide and train our youth" play in a democratic society.[229] Although this case involved a university situation, many of the Court's statements are just as applicable to public elementary and secondary schools:

> Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[230]

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[225] Thornhill v. Alabama, 310 U.S. 88, 102 (1939).

[226] 405 U.S. 438, 458 (1971).

[227] 364 U.S. 479, 487 (1960).

[228] 385 U.S. 589, 603 (1967).

[229] 354 U.S. 234, 250 (1956).

[230] Id.

In Michigan, the use of the book Slaughterhouse Five by Kurt Vonnegut was attacked on the basis of its uninhibited language describing the horrors during World War II. The trial judge held that the book was obscene, but the Michigan Court of Appeals reversed the decision on the following rationale:

> If plaintiff's contention was correct, then public school students could no longer marvel at Sir Galahad's quest for the Holy Grail, nor be introduced to the dangers of Hitler's Mein Kampf nor read the mellifluous poetry of John Milton and John Donne. . . . Our constitution does not command ignorance.[231]

In addition to first amendment cases which have emphasized the importance of protecting the individual's freedom to know and inquire, other cases have indicated that education, like voting, is "anterior to all other values is a democratic society" and necessary in order to render first amendment rights meaningful.[232] In Williams v. Rhodes, the Supreme Court observed that "competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."[233]

In Gaston County v. United States the Supreme Court invalidated a state statute requiring literacy tests as a prerequisite to voting because the tests discriminated against the Negro race. In holding that such legislation violated the Voting Rights Act of 1965, the Court stated:

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[231]Todd v. Rochester Community Schools, 200 N.W. 2d 90 (Mich. Ct. App. 1972).

[232]J. Coons et al., supra note 4, at xx.

[233]393 U.S. 23, 32 (1968).

> The legislative history of the Voting Rights Act of 1965 discloses that Congress was fully cognizant of the potential effect of unequal educational opportunities upon exercise of the franchise. This causal relationship was, indeed, one of the principal arguments made in support of the Act's test-suspension provision.[234]

The Court cited the testimony of Attorney General Katzenback before the Senate Committee on the Judiciary, where he stated that the test requirement for voting would result in the historical denial of equal education becoming the excuse for continuing to deny the right to vote to Negro citizens.[235] The Court also acknowledged that the quality of education available can influence a child's decision to "enter or remain in school."[236]

In his dissenting opinion in Rodriguez, Justice Marshall emphasized the close relationship between education and participation in the political process. He asserted that the nexus between education and freedom of speech placed discrimination in education in a different category from discrimination in public welfare or housing.[237] He thus compared the constitutional status of education to voting rather than to public assistance programs. Justice Marshall supported this contention by noting education's "immediate relationship to constitutional concerns for free speech and for our political processes" and its essential role "in providing the disadvantaged with the tools necessary to achieve economic self sufficiency."[238] He also distinguished education from

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[234] 395 U.S. 285, 289 (1968). [235] Id.
[236] Id. at 296.
[237] 411 U.S. 1, 115, n. 74 (1973) (Marshall, J., dissenting).
[238] Id.

other public functions by pointing out that education is the only public service which is unanimously guaranteed by state constitutions.[239]

The right to education has been compared to the right to 'association', as both are deemed essential to make explicit first amendment rights meaningful, but neither is addressed specifically in the Constitution. In NAACP v. Alabama, the Supreme Court held that "[i]t is beyond debate that freedom to engage in association . . . is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech."[240]

In Griswold v. Connecticut, the Court reiterated that first amendment freedoms include the right to association. The Court also declared that like the right of association, the "right to educate a child in a school of the parents' choice" and the "right to study any particular subject" are not mentioned in the Constitution but have been construed to receive first amendment protection.[241] Furthermore, the Court specifically recognized 'education' as a peripheral right, necessary in order to make explicit first amendment freedoms meaningful:

> [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach. . . . Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the Pierce and Meyer cases.[242] [Citations omitted]

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[239]Id. See Chapter IV, text accompanying notes 294-305, infra, for further discussion of this topic.

[240]357 U.S. 449, 460 (1958).

[241]381 U.S. 479, 482 (1965).

[242]Id. at 482-83.

According to Coons, education is more than equal in importance to the freedoms of speech, association, and voting; it is an essential condition for their enjoyment.[243] He has claimed that discrimination in education burdens both freedom of speech and the entire political process: "Education is the citizen's first political right. It deserves protection equivalent to those first amendment rights of which it is an organic part."[244]

The contention that the right to education is included among first amendment freedoms also can be supported by the constitutional protection the Supreme Court has afforded to 'the right to know' and 'the right to receive information'.[245] If the Supreme Court would unequivocally declare that education is protected by first amendment guarantees, then a more solid constitutional right to an education could be established than by relying on the fourteenth amendment alone. Justice Jackson noted in 1943 that the judicial test of state legislation, which collides with the first amendment in addition to the fourteenth, is more stringent than the test employed when only the fourteenth is involved. In such cases, the state must present more than a rational basis for its action and can restrict personal rights "only to prevent grave and immediate danger to interests which the State may lawfully protect."[246]

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[243]J. Coons, "Fairness in the Distribution of Education," 1972 U. Ill. L. F. 215, 228.

[244]Id.

[245]See Lamont v. Postmaster General, 381 U.S. 301 (1965); Stanley v. Georgia, 394 U.S. 557 (1969).

[246]West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

Although the Supreme Court often has recognized the relationship between education and first amendment freedoms and has even noted the necessity of education in order to render first amendment rights meaningful, the Court has not yet been convinced to afford constitutional protection to education as an inherent first amendment right. If the Court should, however, decide to make such a proclamation, the perimeters would be greatly expanded for the individual to assert his rights to a public education.

Implications of a Substantive Right to a Minimally Adequate Education

The establishment of a sound constitutional basis for the individual to assert his right to an education provided by the state carries with it implications in addition to the mere right of the child to attend school. Will the courts be able to stop at the point of ensuring that no citizen is arbitrarily denied the opportunity to participate in a public school program without making some judgment concerning the adequacy and appropriateness of the program thus provided?

A new type of litigation is emerging which alleges that the child has a right to 'literacy' from his public school experience, if he does have the capability to learn to read. A tort action for damages[247] was initiated in the Spring of 1973 against a school district in California, charging that the student had traveled through the school system and had been regularly passed from grade to grade, but upon graduation he could

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[247]A tort is a civil wrong other than breach of contract, for which the court will provide a remedy in the form of an action for damages.

not read above the fifth grade level.[248] Throughout school, plaintiffs claimed, the student had been given no indication of academic trouble, and he did not discover his reading difficulty until he was privately tested after graduation.

Although this complaint was not based on a constitutional issue, it surfaced questions concerning the school's obligation toward the child. Can the school be held responsible for the student's progress, or is the state's duty fulfilled by making subject matter available to the student? In other words, is there a right to successful education or simply to education? Should the school be required to designate certain criteria before students are progressed, and should standards be set that a student must meet before receiving a diploma? Does the student have the right to a certain level of education or to procedural safeguards which will protect him from erroneous placement?

The San Francisco School District answered the plaintiff's allegations by countering that "the pedagogical process of transferring knowledge and cognitive skills is so complex, and as yet inadequately understood, as not properly to be the subject of the imposition of a duty in tort."[249] Thus, the court is left to determine if the school owed the student a duty to ensure his actual learning, or at least

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[248]Peter Doe v. San Francisco Unified School Dist., cited in G. Saretsky, "The Strangely Significant Case of Peter Doe," Phi Delta Kappan, May, 1973, at 589.

[249]Brief for defendants, cited in "Newsnotes," Phi Delta Kappan, June, 1974, at 720. See "Suing the Schools for Fraud: Issues and Legal Strategies," Transcript of Conference: Fraud in the Schools, Syracuse Un. Research Corp., Eric Reports, ED 084 668, March, 1973.

proper procedures for his diagnosis and prescription, or whether the provision of instruction alone fulfilled the state's obligations.

The increasing national interest in exploring the internal operations of the school to guarantee that the rights of children are not arbitrarily impaired also has been reflected in recent congressional legislation which has addressed certain aspects of the school's duty toward the child. The law regarding the protection of 'human subjects' has been applied to public education in an effort to protect students from mandatory involvement in research projects or experimental programs without consent.[250] Also, legislation concerning the rights and privacy of parents and students has placed restrictions on school officials' former power to indiscriminately record data about students.[251] In addition, procedural safeguards are now required before the school can release a student's personal files. Thus, the rationale that a certain practice is "in the best interests of education" can no longer justify educational policies that arbitrarily interfere with the individual's personal liberties.[252] It is conceivable that Congress will become more explicit in establishing standards regarding school policies and the state's obligations to the individual, perhaps even in the area of instructional program adequacy.

If courts are to enforce guarantees of a minimum level of education for students, first the "quantum of education" which is considered to

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[250]5 U.S.C. 301, Section 46, 39 Fed. Reg. 105 (May 30, 1974).

[251]Amendments to General Education Provisions Act, "Family Educational Rights and Privacy Act of 1974," P.L. 93-380, Section 513.

[252]Acquirre v. Tahoka Indep. School Dist., 311 F. Supp. 664, 666 (N.D. Tex. 1970).

be minimally adequate or constitutionally required must be identified.[253] This issue needs to be addressed by all three branches of government and citizens across the country, because until some type of consensus is reached concerning what constitutes a 'minimum' or 'quality' education, the courts will have a difficult time devising guidelines to enforce the school's duty and to protect personal interests involved.

Another obstacle confronting court-required reform in education is evaluation of the distribution of educational services. Since students vary greatly as to background and ability, the educational services required to meet minimum standards (assuming such standards were established) must also vary according to specific situations.[254] Thus, the courts are faced with the 'educational needs issue' which was declared to be nonjusticiable in the school finance case, McInnis v. Shapiro:

> Even if the fourteenth Amendment required that expenditures be made only on the basis of pupils' educational needs, this controversy would be nonjusticiable. While the complaint does not present a 'political question' in the traditional sense of the term, there are no 'discoverable and manageable standards' by which a court can determine when the Constitution is satisfied and when it is violated.[255]

Hopefully, the recent advances in refining diagnostic procedures and measuring educational needs[256] will offer more manageable standards for

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[253]Rodriguez, 411 U.S. 1, 36-37 (1973).

[254]See the discussion of Lau v. Nichols accompanying note 185, supra.

[255]293 F. Supp. 327, 334 (N.D. Ill. 1968), aff'd 394 U.S. 322 (1969).

[256]W. McLure, "Measuring Educational Needs and Costs," Financing Education 197 (R. Johns, K. Alexander, & K. F. Jordan, eds., 1972).

evaluating educational programs and will thus encourage the judiciary to enter the educational arena with greater confidence.

The above unresolved issues have caused judicial hesitancy in venturing into the 'thicket' of the internal operations of schools to interfere with problems of such political magnitude. Nevertheless, dedicated egalitarians, in search of a firm constitutional basis to protect the individual's interests in education, can be encouraged by the Supreme Court's current emphasis on requiring procedural due process in connection with arbitrary or discriminatory state action. Whether it is because the state has created 'irrebuttable presumptions' about classes of persons or because the individual's protected property interests have been impaired, the requirement of procedural safeguards can lead to constitutional protection of the student's right to attend school, his right to appropriate placement in instructional programs, and ultimately to assurance of the student's right to receive at least minimum educational benefits suited to his needs due to the compulsory imposition of schooling in his life.

CHAPTER IV

EQUAL TREATMENT OF EQUALS

For centuries philosophers and political scientists have debated the meaning of the concept 'equality'.[1] The term suggests that a relationship must be present. Thus, two entities are necessary which possess a common property that can be compared for similarities and/or differences.[2] When comparing inanimate objects, equality easily can be ascertained by using common units of measurement to compare specific attributes such as weight.

The notion of 'equality', however, is harder to grasp in connection with human beings, as the term becomes entwined with emotions and takes on many connotations. For example, in the political sphere 'equality' could mean equal access to public goods, but not necessarily equal distribution. Conversely, 'equality' could designate that each person would receive the same numerical amount of each good being distributed or that distribution would be based on criteria such as merit or need.[3] It is beyond the scope of this study to debate whether this society should strive to make all persons equal or simply to treat all persons equally.[4] However, the nebulous character of the term 'equality' should

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[1]For a historical analysis of the equal protection clause, see "Developments in the Law--Equal Protection," 82 Harv. L. Rev. 1065, 1160 (1969).

[2]J. Coons, W. Clune, & S. Sugarman, Private Wealth and Public Education 299 (1970).

[3]"Developments in the Law--Equal Protection," supra note 1, at 1165-67.

[4]See id. 1160-61, for discussion of this issue.

be emphasized, as it may be partly responsible for the judicial dilemma in interpreting the meaning of fourteenth amendment mandates.

Standards for Reviewing Equal Protection of the Laws

The fourteenth amendment refers to a specific type of equality, equal protection of the laws. The constitutional concept of 'equal protection' requires that governmental action not discriminate unfairly between persons similarly situated. According to Shannon, the Federal Constitution "envisions all people being treated by law in the same manner," unless it can be demonstrated that differential treatment is justified to achieve a valid governmental goal.[5] Justice Frankfurter explained that the equal protection clause "does not require things which are different in fact or opinion to be treated in law as though they were the same."[6] Thus, the Constitution allows states to classify individuals by legislative action, but the basis for the classification must be a reasonable one.

In Harper v. Virginia Board of Elections, the Supreme Court stated that the "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause do change."[7] Justice Douglas concurred with this view in a later decision and emphasized that the framers of the amendment designed it to be "interpreted by future generations in accordance with the vision and needs of those generations."[8] Even though

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[5]T. Shannon, "Chief Justice Wright, the California Supreme Court and School Finance: Has the Fourteenth Done It Again?" 3 NOLPE School L. J. 1 (1973). See Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[6]Tigner v. Texas, 310 U.S. 141, 147 (1940).

[7]383 U.S. 663, 669 (1966).

[8]Oregon v. Mitchell 400 U.S. 11, 139-140 (1970) (Douglas, J., separate opinion).

members of the judiciary may feel that the interpretation of the equal protection clause must change with the changing times, this attitude alone does not solve the problem of determining concrete criteria to use in analyzing state legislation. Of course, the Court has recognized that enforcement of precise equality is unrealistic and impractical,[9] but the court has failed to articulate the degree of equality that is constitutionally mandated.

Benson has made the following analysis of equal protection of the laws as it applies to public education:

> The only universally accepted criterion of a public activity is that it affords equal treatment to equals. With respect to schooling, this implies that any two children of the same abilities shall receive equivalent forms of assistance in developing those abilities, wherever they live in a given state and whatever their parental circumstances are.[10]

Moynihan has recognized the interesting contradiction inherent in the term 'equal educational opportunities'. The word 'opportunity' suggests people getting ahead of one another, while 'equality' suggests people receiving the same treatment. Thus, Moynihan has concluded that the merger of these two concepts has been the possible source of some of the existing confusion over the type of equality required in public education.[11] Michelman has further observed that education is a relative value and takes on meaning in relation "to having as much as or more than someone else has."[12] Thus, because of its relevance to competitive

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[9]See Mayer v. City of Chicago, 404 U.S. 189, 194-95 (1971); Draper v. Washington, 372 U.S. 487, 495-96 (1963).

[10]C. Benson, The Cheerful Prospect: A Statement on the Future of Education 62 (1965).

[11]D. Moynihan, "Solving the Equal Educational Opportunity Dilemma: Equal Dollars is not Equal Opportunity," 1972 U. Ill. L. F. 259, 262.

[12]F. Michelman, "Supreme Court 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment," 83 Harv. L. Rev. 7, 49 (1969).

society, inequality of access in education "will entail evils of absolute deprivation."[13]

The Traditional Equal Protection Standard of Review

Two judicial tests have evolved concerning equal protection of the laws. If no fundamental right or suspect classification is involved, the traditional test is evoked. In this analysis, it is sufficient for the state to show that the challenged classification bears some rational relationship to a legitimate purpose of the state.[14] Using this standard of review, the presumption of constitutionality is with the state action.

As early as 1880, the Supreme Court used the equal protection clause to invalidate arbitrary legislative classifications which excluded Negroes from serving on juries.[15] Also, the clause was soon expanded to protect minorities, other than Negroes, from "invidious discrimination" by the state.[16]

In McGowan v. Maryland, Chief Justice Warren summarized the traditional or 'rational basis' test of state legislation under the equal protection clause. He stated that no precise formula has been devised, but the Court has usually left the states "a wide scope of discretion in enacting laws which affect some groups of citizens differently than others."[17] He further emphasized that a classification would be considered unconstitutional only if it rested on "grounds wholly irrelevant

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[13] Id.
[14] McDonald v. Bd. of Election Comm'rs, 394 U.S. 802 (1969).
[15] Strauder v. West Virginia, 100 U.S. 303 (1880)
[16] See Yick Wo v. Hopkins, 118 U.S. 356, 367 (1886).
[17] 366 U.S. 420, 425 (1961).

to the achievement of the State's objective," and that statutes would not be invalidated "if any state of facts reasonably may be conceived to justify it."[18]

In the majority of the Supreme Court rulings concerning economic regulation, the Court has chosen the traditional standard of review and has analyzed the relationship between the legislative purpose and the means chosen to achieve the purpose. This form of analysis has been referred to as the 'means/ends' approach. As a means to accomplish a given purpose, the legislative body uses selected criteria, ranging from personal qualities to individual actions, to distinguish groups of persons upon whom the law will operate. These classifying factors must be rationally related to the governmental purpose if the legislation is to survive judicial analysis under the 'means/ends' or 'rational basis' doctrine.[19]

Coons et al. have claimed that a major problem with the traditional equal protection standard is that it depends upon a legislative purpose that is often unclear: "Any ambiguous purpose can be construed by the court so as to conform to the adopted means of classification."[20] Also, courts have not been consistent in analyzing legislation under the classical approach, thus creating confusion as to the scope of equal protection guarantees. Members of the judiciary have struck down slight

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[18] Id. at 426.

[19] J. Coons et al., supra note 2, at 321.

[20] Id. at 329. Coons et al. have presented a lengthy discussion of arguments against the 'rational basis' equal protection standard of review, id. at 326-34.

disparities between legislative means and ends when they have had strong feelings about the classifications involved. In other litigation, classifications only vaguely related to state purposes have been upheld, with no apparent explanation for the lenient treatment.[21] Perhaps this is one reason why a second equal protection standard evolved during the Warren Court era.

The Strict Scrutiny Equal Protection Standard of Review[22]

The equal protection standard popularized under Chief Justice Warren involves a more stringent test of 'strict judicial scrutiny' when the state impinges upon a 'fundamental interest' or when the alleged discrimination involves a 'suspect classification'.[23] To pass this test, the state is required to establish that its action is necessary to advance a 'compelling interest' of the state. In litigation qualifying for application of this standard of review, the burden of proof shifts dramatically in favor of the party contesting the legality of the state action.

Employing the strict scrutiny equal protection standard, the Court has looked carefully at three items: (a) the character of the classification in question, (b) the individual's interests affected by the classification, and (c) the governmental interests asserted in support

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[21]For comments on the various standards of equal protection analysis used by the Supreme Court, see Vlandis v. Kline, 412 U.S. 441, 458-59 (1972) (White, J., concurring).

[22]Throughout this study the terms 'strict scrutiny review' and 'compelling interest doctrine' are used interchangeably to indicate the equal protection standard evoked when a 'fundamental interest' and/or a 'suspect classification' are involved.

[23]See Douglas v. California, 372 U.S. 353 (1963); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

of the classification.[24] In contrast to the traditional standard of review, more than the classification and governmental purposes are analyzed; the outcome of the litigation may be determined by the personal interests influenced by the classifying factors. In 1972, the Supreme Court stated that if statutes impinge upon fundamental freedoms, "the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest."[25]

Gunther and Dowling have described the strict scrutiny equal protection standard as the Supreme Court's "favorite and most far-reaching tool for judicial protection of 'fundamental' rights not specified in the Constitution."[26] Coons et al. have contended that the Court has used this standard to create an "inner circle of cases to be given special scrutiny on substantive grounds."[27] They have further asserted that when the Court has employed the 'compelling interest' doctrine, it has looked far beyond the relationship between the legislature's goal and the means selected for its attainment: "Instead, it has sat in candid judgment upon the very purpose and, more often, upon the objective effects of legislation."[28]

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[24]Williams v. Rhodes, 393 U.S. 23, 30 (1968).

[25]Eisenstadt v. Baird, 405 U.S. 483, 447, n. 7 (1972).

[26]C. Gunther & N. Dowling, Constitutional Law: Cases and Materials 983 (1970).

[27]J. Coons et al., supra note 2, at 339.

[28]Id.

The Equal Protection 'Sliding Scale'

In applying the 'compelling interest doctrine', the Supreme Court has developed a sliding scale to determine the breadth of equal protection guarantees.[29] Some inherently suspect classifications, such as race,[30] alienage,[31] and nationality[32] will evoke strict judicial scrutiny of the governmental action regardless of whether the interest affected is considered to be fundamental. Likewise, certain interests have been judicially declared to be so fundamental that they deserve special treatment under the equal protection clause even in conjunction with classifications which might be considered neutral under other circumstances. Individual interests in fair criminal procedures,[33] voting,[34] interstate travel,[35] association,[36] and procreation[37] have been deemed so fundamental as to be afforded special constitutional protection.

In discussing the sliding scale, Cox has observed that the very existence of a legislative distinction drawn upon a highly suspect classification or impinging upon a highly fundamental interest may require demonstration of a compelling state goal. However, as the classification becomes less invidious, the interest at stake must increase in significance

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[29]D. B. Hornby & G. Holmes, "Equality of Education," 58 Va. L. Rev. 161, 168 (1972).

[30]Brown, 347 U.S. 483 (1954); McLaughlin v. Florida, 379 U.S. 184, 191-192 (1964).

[31]Graham v. Richardson, 403 U.S. 365 (1971).

[32]Oyama v. California, 332 U.S. 633 (1948).

[33]Griffin v. Illinois, 351 U.S. 12 (1964).

[34]Reynolds v. Sims, 377 U.S. 533 (1964).

[35]United States v. Guest, 383 U.S. 745 (1966).

[36]NAACP v. Alabama, 357 U.S. 449, 460 (1958).

[37]Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

in order to require a compelling state purpose.[38] Holmes and Hornby have referred to the relationship of fundamental interests to suspect classifications as the "core of the Supreme Court's egalitarian revolution."[39]

Since the strict scrutiny standard involves consideration of the type of classification and/or the nature of the interest affected, the result is that the same interest (e.g., education) may evoke strict judicial scrutiny in some cases and not in others depending on the form of the classification. Likewise, classifications (other than those deemed inherently suspect) may receive preferred judicial treatment when combined with certain interests and not with others. Thus, discriminatory wealth classifications have been invalidated when affecting fair criminal procedures,[40] but wealth classification in conjunction with financing public education has not been declared 'suspect' by the Supreme Court.[41] Similarly, discrimination resulting from geographical classification has been proclaimed unconstitutional when influencing voting rights,[42] whereas discrimination in education based on geographical classification has been upheld by the Court.[43] However, discrimination in public schools based on racial classifications has been struck down by the Supreme Court.[44]

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[38]See A. Cox, "Supreme Court 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights," 80 Harv. L. Rev. 91, 94-96 (1966).

[39]D. B. Hornby & G. Holmes, supra note 29, at 168.

[40]Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1964).

[41]Rodriguez, 411 U.S. 1 (1973).

[42]McDonald v. Bd. of Election Comm'rs, 394 U.S. 802 (1969).

[43]Rodriguez, 411 U.S. 1 (1973).

[44]Brown, 347 U.S. 483 (1954).

Criticism of the Strict Scrutiny Standard of Review

Some justices have criticized the use of the strict scrutiny standard of review, alleging that it allows a majority of the Supreme Court members to override almost any legislative judgment. Not since 1944 has the Court declared a state purpose to be sufficiently compelling to justify impairment of a 'fundamental interest' or creation of a 'suspect classification'.[45] It appears, therefore, that the key to the balancing process in strict scrutiny review is the determination of whether a 'fundamental interest' or 'suspect classification' is involved. Then, the 'compelling state interest' aspect of the doctrine becomes almost academic.

Since the use of strict scrutiny review has usually meant unconstitutionality of the state action, this doctrine has received criticism similar to that directed toward substantive due process review.[46] Justice Harlan objected on the basis that the strict scrutiny standard threatened to swallow the traditional equal protection test. He also contended that strict judicial scrutiny was unnecessary in equal protection analysis because due process review could be used to protect any right guaranteed by the Constitution.[47]

In Dunn v. Blumstein, Chief Justice Burger objected to the use of the strict scrutiny standard to invalidate a one-year residence requirement for voters:

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[45]Korematsu v. United States, 323 U.S. 214 (1944). See D. B. Hornby & G. Holmes, supra note 29, at 169-170.

[46]See Chapter III, text with notes 204-07, supra.

[47]Shapiro v. Thompson, 394 U.S. 618, 655-63 (1969) (Harlan, J., dissenting).

> To challenge such lines by the compelling state interest standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.[48]

The Chief Justice also has denounced judicial application of 'strict scrutiny' in cases when the Court does not explain "why the statute impairs a genuine constitutional interest truly worthy of the standard of close judicial scrutiny."[49]

The lack of definitive standards for ascertaining when strict judicial scrutiny would be evoked has caused some apprehension concerning the expansion of this 'compelling state interest' doctrine. Cox has cautioned that "[o]nce loosed, the idea of Equality is not easily cabined."[50] Karst has remarked that the 'fundamental interests' aspect of this equal protection standard is particularly open-ended, leaving wide discretion in the hands of the judiciary for overruling legislative decisions.[51] The 'strict constructionists' fear the possibility that the judicial branch will become a 'super legislature' if it continues to apply the strict scrutiny standard in litigation involving equal protection of the laws.

Equal Protection and Due Process Guarantees Compared and Contrasted

The relationship between due process and equal protection guarantees has been recognized often by the courts. Chief Justice Warren

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[48]405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

[49]Vlandis v. Kline, 412 U.S. 441, 460 (1972) (Burger, C.J., dissenting).

[50]A. Cox, supra note 38, at 91.

[51]K. Karst, "Invidious Discrimination: Justice Douglas and the Return of the 'Natural-Law-Due-Process Formula'," 16 U.C.L.A. L. Rev. 716 (1969).

stated in 1954 that "[t]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive."[52] Likewise, in 1973, Justice Marshall observed that combining elements traditionally identified with the two separate doctrines is justified in reviewing the constitutionality of state action since the elements of fairness should not be so rigidly classified.[53]

Many of the same problems confront the courts when they evoke either standard of review. Justice Frankfurter's description of the uncertainty of the task when applying due process guarantees is equally applicable to the determination of fundamental interests and suspect classes under the equal protection clause:

> It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.[54]

Michelman also has declared that equal protection review "involves the Court in a sculpting and ranking of values not essentially different from what occurs under 'substantive due process'."[55]

According to Nowak, the following criteria distinguish cases requiring equal protection analysis from those requiring due process review:

> When the limitation of a fundamental right is directed at a particular class, it properly is reviewed under the equal protection guarantee. When a law limits

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[52]Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[53]United States Depar't of Agriculture v. Murry, 413 U.S. 508, 519 (1973) (Marshall, J., concurring).

[54]Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951).

[55]F. Michelman, supra note 12, at 17, n. 25.

> the exercise of a fundamental right of all persons, however, the law has made no such classification and is properly the subject of review under the due process guarantees of the fifth and fourteenth amendments.[56]

Justice Marshall has observed that the equal protection clause is not addressed to "minimal sufficiency" or determination of whether some "adequate level of benefits" has been provided to all citizens, as might be true of the due process clause. Rather, equal protection is concerned with "unjustifiable inequalities of state action."[57]

In some situations, an individual suffers when he is not treated as well as others are treated, and thus he would have an equal protection claim. In other situations, an individual may suffer when the governmental treatment he receives, regardless of the treatment of others, falls below a minimum standard of adequacy. In such cases, due process guarantees would be called into play.[58]

Although there are similarities between judicial identification of 'fundamental interests' for equal protection review and determination of 'due process liberties', the conclusions reached may not always be the same. In fact, the Supreme Court's lack of definitve standards for ascertaining preferred interests under either doctrine has been the source of much debate among legal scholars.

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[56]J. Nowak, "Realigning the Standards of Review Under the Equal Protection Guarantee--Prohibited, Neutral, and Permissive Classifications," 62 Geo. L. J. 1071, 1089 (1974).

[57]Rodriguez, 411 U.S. 1, 89 (Marshall, J., dissenting).

[58]See "Developments in the Law--Equal Protection," supra note 1, at 1130.

One theory is that all interests found to be protected as due process 'liberties' would also be considered 'fundamental' under the equal protection clause, so that discriminatory treatment regarding those interests would require the state to demonstrate a compelling governmental purpose. According to this theory, interests receiving preferred equal protection treatment, however, would not always be secured as due process 'liberties'.[59] In other words, due process guarantees may not require the state to provide certain services, but if the state decides to furnish the services to some citizens, the equal protection clause would mandate that the opportunities be made available to all persons on an equal basis unless discriminatory classifications could be justified. An example supporting this line of reasoning is that the state is not required by the due process clause to provide legal education for its citizens, but the Supreme Court has held that once the state undertakes to provide such training, it must be made available to all residents "upon the basis of an equality of right."[60]

Flygare has proposed a theory in direct opposition to the one just described. He has asserted that interests included within the fourteenth

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[59]"Developments in the Law--Equal Protection," supra note 1, at 1130.

[60]Missouri ex rel. Gaines v. Canada, 305, U.S. 337, 349 (1938). See "Developments in the Law," id., where the example is given: "It may be . . . the due process clause does not require that a state provide a criminal defendant with an appeal as of right, whereas the equal protection clause does require that if the state provides an appeal to some it cannot deny it to others because of their inability to pay. . . ." Cf. Douglas v. California, 372 U.S. 353 (1963). See also M. McClung, "The Problem of the Due Process Exclusion: Do Schools Have a Continuing Responsibility to Educate Children with Behavior Problems?" 3 J. L. & Educ. 491, 495-96 (1974).

amendment's protection of 'liberty and property' are more numerous than those delineated as 'fundamental interests' for equal protection review. According to Flygare, equal protection 'fundamental interests' must be "guaranteed" either explicitly or implicitly by the Constitution, whereas "interests related to liberty or property only must be encompassed rather than guaranteed."[61] An example to substantiate this theory is that the Supreme Court has required procedural due process prior to the termination of welfare benefits,[62] but the Court has not declared that the right to such benefits is 'fundamental' for equal protection review.[63]

A third possible theory is that interests recognized by the Supreme Court as explicit or implied 'liberties' under the due process clause would automatically receive the full guarantee of equal protection of the laws, while interests recognized as 'property rights' would be entitled to procedural due process but would not be considered 'fundamental' for equal protection purposes. Using this logic, the Supreme Court would afford greater judicial protection to fourteenth amendment liberty rights than to fourteenth amendment property rights.[64] The Court's ambiguity in categorizing preferred personal interests has provided a fertile ground for such theorizing and perhaps has accounted for the Court's vacillation between using due process and equal protection standards in reviewing alleged discriminatory state legislation during

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[61]T. Flygare, "Short-Term Student Suspensions and the Requirements of Due Process," 3 J. L. & Educ. 529, 542 (1974).

[62]Goldberg v. Kelly, 397 U.S. 254 (1970).

[63]Dandridge v. Williams, 397 U.S. 471 (1970).

[64]See Chapter V, text accompanying note 53, infra.

recent terms.[65] It appears that the Supreme Court has not yet found a comfortable middle ground in its efforts to protect individual interests without massive intervention in the state's legislative domain.

It may be that substantive due process forms a stronger, more consistent basis for asserting a right to an education, but the equal protection clause also offers some advantages for attacking discrimination in public schooling. Equal protection guarantees can require that state action apply equally to persons similarly situated even though the interest involved is not considered to be a fundamental right. Hence, if the courts determine that the individual does not have an inherent constitutional right to an education, the equal protection clause still can require that once a state undertakes to provide educational opportunities, it must do so on a nondiscriminatory basis. Thus, if classifications for unequal treatment can be shown to be arbitrary or unreasonable, the state action can be invalidated as denying equal protection of the laws. The end results of protecting the interests of students, therefore, can be very similar using either due process guarantees or equal protection mandates.

The remaining sections in this chapter explore judicial application of the equal protection clause to invalidate discriminatory practices in public schools. Precedents established in equal protection litigation,

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[65] See Chapter III, text with notes 188-212, supra, for a discussion of the evolving due process standard of review. See also text with notes 361-412, infra, for a discussion of the emerging equal protection doctrine of analysis.

other than school cases, are also reviewed if they are salient to an analysis of constitutional requirements for equality in public education.

Equal Protection and Racial Discrimination in Education

The involvement of the federal judiciary in the internal operations of public schools has come about mainly due to the issue of racial discrimination. Thus, it is germane to a discussion of an individual's right to equal educational opportunities to explore precedent established in litigation involving desegregation in education. These cases also portray the Supreme Court's changing view toward one kind of discrimination in public schools and emphasize the Court's interpretation of the concept of 'state action' in education.

The 'Separate, but Equal' Doctrine

As early as 1849 the Supreme Court of Massachusetts espoused the philosophy of separate, but equal schools for black and white children.[66] Since the fourteenth amendment did not exist in 1849, the question of equal protection of the laws was not even addressed. Thus, the case was decided on the basis of state law, and the court concluded that neither the state constitution nor state laws established a personal right to receive an education.[67]

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[66]Roberts v. the City of Boston, 59 Mass. Rpts. (5 Cushing) 198, 205 (1849). Chief Justice Shaw, writing for the court, stated that the black student had not been unlawfully excluded from public school instruction even though she was denied attendance at the school nearest her home and was forced to travel to a more distant school composed entirely of black children.

[67]Id. at 207.

In 1896, The United States Supreme Court clearly stated that 'separate, but equal' facilities for blacks and whites satisfied constitutional requirements of the equal protection clause of the fourteenth amendment.[68] In delivering the majority opinion in Plessy v. Ferguson, Justice Henry Brown stated:

> Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences and the attempt to do so can only result in accentuating the difficulties of the present situation.[69]

Thus, the 'separate, but equal' doctrine became firmly established and reigned as the law of the land for over half a century. Under this precedent, the individual had the right to equal treatment, although separate, and the state had the corresponding duty to make such equal opportunities and facilities available.

Three years after Plessy v. Ferguson, the Supreme Court was called upon to review a school board's decision to suspend operation of the only high school for blacks, while continuing to maintain a high school for white children.[70] Board members based the validity of their action on economic considerations. The Supreme Court refused to address the obvious inequality of treatment and instead held that education "is a matter belonging to the respective States, and any interference on the part of the Federal authority with the management of such schools cannot be justified" except in situations of "unmistakable disregard" of

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[68]Plessy v. Ferguson, 163 U.S. 537 (1896).

[69]Id.

[70]Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

protected rights.[71] Thus, the Court concluded that the case at bar presented no constitutional violation.

Erosion of the 'Separate, but Equal' Doctrine

Toward the middle of the twentieth century the Supreme Court began chipping away at the 'separate, but equal' doctrine in education by analyzing the actual equality of separate educational opportunities provided for blacks and whites. The first inroads against legally sanctioned segregation were made at the graduate level. This choice of target was partly because the National Association for the Advancement of Colored People (NAACP) rightly assumed that the courts would be more familiar with inequalities in graduate education, particularly legal education.[72]

In Gaines v. Canada, a black student was denied admittance to the University of Missouri law school on the basis of his race. The Supreme Court granted the student a writ of mandamus to compel the University of Missouri to enroll him, and for the first time the Court began to speak of "substantially equal advantages in education" and a "federal right to equal education."[73] The Supreme Court in Gaines defined the legal issue as follows:

> The question here is not the duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the state upon the basis of an equality of right.[74]

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[71] Id. at 545.

[72] H. Hudgins, "Public School Desegregation: Legal Issues and Judicial Decisions," Eric Reports, ED 082 272, 1973, at 2.

[73] Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

[74] Id. at 349.

The Court addressed the issue of whether the provision for legal education of blacks in other states would satisfy equal protection mandates and concluded that the black student was entitled to equal educational facilities within the state's borders, since the state afforded such opportunities to members of the white race.[75] In a concurring decision, Justice McReynolds observed that under the majority ruling, Missouri could either provide legal education for black students or disband such opportunities for all students, thus disadvantaging black and white students alike.[76]

In Sweatt v. Painter, although the Court was urged to explore the broader issue of the entire 'separate, but equal' doctrine, the Supreme Court chose to "adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court."[77] Sweatt, a black student, had been refused admission to the University of Texas law school on the rationale that Texas offered equivalent facilities in a separate law school for blacks. Chief Justice Vinson, writing for the Court, made comparisions between the two law schools and concluded that they were not substantially equal. Under equal protection quarantees, the Court held that the plaintiff could claim "his full constitutional right: legal education equivalent to that offered by the state to students of other races."[78]

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[75] Id. at 344.

[76] Id. at 353 (McReynolds, J., concurring). See Sipuel v. University of Oklahoma, 332 U.S. 631, 632-33 (1948), where the Supreme Court reiterated that equal protection mandates concerning legal education for blacks could be satisfied by either temporary integrated education or no educational opportunities for applicants of any racial group. See also Fisher v. Hurst, 333 U.S. 147 (1948).

[77] 339 U.S. 629, 631 (1950).

[78] Id. at 635.

In another higher education case, McLaurin v. Oklahoma State Regents, the Supreme Court held that a black graduate student in education had "a personal and present right to the equal protection of the laws" and that he "must receive the same treatment at the hands of the State as students of other races."[79] Although McLaurin had been admitted to the University of Oklahoma graduate school, he was segregated in classes, the library, and the cafeteria. The Court held that this segregated treatment handicapped McLaurin in "his ability to study, . . . and in general to learn his profession."[80]

The precedents established in these pre-Brown higher education cases are relevant to an analysis of the scope of equal protection requirements in education for one primary reason. In this litigation, the Supreme Court placed the burden on the states to provide equal educational services for blacks and whites, even though segregated facilities still were considered to be constitutionally permissible. Thus, the issue involved in these cases was not complicated by evaluation of the legality of segregation per se, and the Court focused solely on the equal protection mandate for state educational opportunities to be offered to all citizens "upon the basis of an equality of right."[81]

Brown and Its Progeny

It had become apparent by the early fifties that the Supreme Court could not continue reviewing the equality of educational opportunities offered to blacks and whites. If it had, it would have been flooded

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[79]339 U.S. 637, 642 (1950). [80]Id. at 641.

[81]Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 349 (1938).

with claims of inequalities and in essence would have become a 'giant accrediting agency'. Thus, in 1954, the Supreme Court announced the termination of the 'separate, but equal' doctrine in the landmark decision of Brown v. Board of Education of Topeka. The unanimous court held:

> We conclude that in the field of public education the doctrine of "separate, but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and other similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the fourteenth amendment.[82]

Former Chief Justice Warren has reflected that the Brown ruling was one of the two most significant decisions reached during his term on the Supreme Court.[83] In addition to overturning legal precedent and changing the lives of millions of children, this decision also gave new interpretation to the equal protection clause which initiated the egalitarian revolution[84] and gave birth to the concept of 'equal educational opportunities'. The memorable words of Chief Justice Warren are often used to support the contention that equality in public education is mandated by the United States Constitution: "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[85]

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[82]347 U.S. 483, 494-95 (1954).

[83]H. Hudgins, supra note 72, at 1.

[84]For a discussion of the 'egalitarian revolution' as a result of the Brown decision, see P. Kurland, "The Supreme Court 1963 Term, Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," 78 Harv. L. Rev. 143, 145-62 (1964).

[85]Brown, 347 U.S. 483, 493 (1954).

In Brown II, the Supreme Court announced that the newly established constitutional standard was to be achieved "with all deliberate speed" in all school districts where segregation was sanctioned by law.[86] Although this decision stimulated much debate concerning the actual extent of the constitutional requirements and although school districts are still involved in litigation two decades after the decision, it did cause members of the judiciary and citizens across the country to look more closely at the gross inequalities among public schools and to evaluate remedial plans for eliminating discriminatory practices.

In Bolling v. Sharpe, the Supreme Court reached the same conclusion as in Brown, but on different grounds. Since the fourteenth amendment did not apply to the District of Columbia, the Court used fifth amendment due process guarantees to invalidate school segregation.[87] The Court held that the discrimination could not be justified because there was no "reasoned connection between the objective sought and the classification established."[88]

When Arkansas attempted to defy the Supreme Court's Brown edict, the Court took the opportunity in Cooper v. Aaron to expound upon the concept of 'state action' and the role of the federal judiciary in matters involving public education.[89] The Court definitively announced that "the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws," and thus struck down

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[86]Brown v. Bd. of Educ. of Topeka, Kansas, 349 U.S. 294 (1955).
[87]347 U.S. 497 (1954).
[88]Id. at 499. See P. Kurland, supra note 84, at 147.
[89]358 U.S. 1, 17 (1958).

Arkansas' attempt to nullify the Supreme Court ruling by placing the state between the people and federal constitutional guarantees.[90]

The Court further reminded the states in Cooper that they are bound by the holdings of the United States Supreme Court:

> In 1803 Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of Marbury v. Madison that "It is emphatically the province and duty of the judicial department to say what the law is."[91]

Thus, the Court reiterated the principle that the federal judiciary occupies the supreme role in interpreting the Constitution and that infringement upon this role by the states would not be tolerated.

In Bush v. Orleans Parish School Board, a three-judge federal court declared Louisiana statutes to be unconstitutional which empowered the Governor to close schools that had been ordered to integrate.[92] The Supreme Court affirmed the federal court's conclusion that the laws were invalid since they were designed to maintain segregated public schools in Louisiana rather than to terminate public education.[93] In another Louisiana case, the legality of a statute which authorized school boards to close public schools upon a vote of the electors was challenged. The three-judge federal court held that the statute violated the equal protection clause because "its application in one parish, while the State provides public schools elsewhere, would unfairly discriminate against

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[90] Id.

[91] Id. at 18, quoting from Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[92] 187 F. Supp. 42 (E.D. La. 1960), 188 F. Supp. 916 (E.D. La. 1960), aff'd mem., 364 U.S. 500 (1960).

[93] Id., 364 U.S. at 500-501.

the residents of that parish, irrespective of race."[94] The Supreme Court subsequently affirmed the lower court ruling in a per curiam decision.

In 1964, the Supreme Court dealt directly with the question of whether a state could close some of its schools in order to avoid desegregation. Public officials of Prince Edward County, Virginia had closed the public schools and established private, totally white schools in their place. The Supreme Court held that the closing of public schools in a single county, while public schools in the remainder of Virginia were being maintained, was a ploy to perpetuate segregation.[95] Justice Black stated for the Court:

> Whatever nonracial grounds might support a state's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.[96]

Although the Court stated that schools could not be closed for racially discriminatory reasons, it hedged on the issue of whether a state could disband public education for all citizens. Kurland has suggested that if the discrimination resulted from the schools in Prince Edward County being closed while others remained open, the natural alternatives would be to close all public schools or open those in Prince Edward County.[97] However, the Supreme Court declined to offer

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[94]Hall v. St. Helena Parish School Bd., 197 F. Supp. 649, 651 (1961), aff'd mem., 368 U.S. 515 (1962).

[95]Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964).

[96]Id. at 231.

[97]P. Kurland, supra note 84, at 158.

those alternatives, and thus left open to speculation how it would rule if a state decided to deny public educational opportunities to all its citizens.

Even though the Supreme Court continued to react to gross violations of the constitutional principles enunciated in the Brown decision, it was not until 1968 that the Supreme Court reentered the school desegregation arena in an affirmative manner. In fact, from 1954 until 1968, many lower courts were allowed to interpret Brown as a mandate to eliminate barriers to desegregation, but requiring no affirmative state action to promote school integration.[98] The stage was set for the Supreme Court to act by a Fifth Circuit Court of Appeals ruling which formulated principles that were subsequently used by courts throughout the South to place many school systems under judicial supervision.[99] In striking down earlier distinctions made between integration and desegregation, the appellate court declared that states which had operated legally sanctioned segregated school districts in 1954 had "an affirmative duty" to bring about integrated, unitary systems.[100]

The year following the Fifth Circuit ruling, the Supreme Court handed down a trilogy of decisions in an attempt to put more force into the Brown mandate. In all three cases the Court invalidated 'freedom-of-choice'

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[98]See Briggs v. Elliott, 132 F. Supp. 776 (D.C. S.C. 1955), where the South Carolina district court interpreted the Brown mandate to mean that states could not deny to any person the right to attend a school because of race, but that states were not required to take affirmative action to integrate or "mix persons of different races in the schools."

[99]United States v. Jefferson County Bd. of Educ., 372 F. 2d 836 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967).

[100]Id., 372 F. 2d at 847.

or 'free transfer' desegregation plans due to their ineffectiveness as remedial measures.[101] School officials were declared to have an obligation to eliminate racial discrimination "root and branch."[102] In 1969 the Supreme Court revealed its impatience with the inaction of states in dismantling dual school systems by admitting that the former mandate to desegregate 'with all deliberate speed' was having little effect. Therefore, in Alexander v. Holmes County Board of Education, defendant school districts were ordered to produce unitary school systems at once, in which no person would be excluded from any school because of race.[103]

Still, it was not until two years later in the landmark decision of Swann v. Charlotte-Mecklenburg Board of Education that the Supreme Court attempted to formulate specific guidelines for identifying and achieving unitary, desegregated school systems. In so doing, the Court started a chain of reactions which has caused the school desegregation dilemma to become a focal point in the North as well as the South. The Court placed the burden on school authorities to prove that the continuance of one-race schools in a district was not the result of present or past discrimination.[104]

The Court also announced that the practice of assigning students to the school nearest their homes was not a valid basis for operating

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[101] Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968); Raney v. Bd. of Educ., 391 U.S. 443 (1968); Monroe v. Bd. of Comm'rs of Jackson, Tennessee, 391 U.S. 450 (1968).

[102] Green, id., 391 U.S. 438.

[103] 396 U.S. 19, 20 (1969).

[104] 402 U.S. 1 (1971).

a school district if it failed "to counteract the continuing effects of past school segregation."[105] The well-known lines of Chief Justice Burger embodied the sentiment of the Court:

> Absent a constitutional violation, there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation.[106]

By sanctioning 'busing' as a permissible remedy for achieving desegregation, the Swann decision started the public hysteria which has led to the active involvement of the legislative and executive branches of the government in molding the future of school desegregation in this nation.[107]

Expanding the Scope of De Jure Segregation

Since all four of the school districts specifically covered by the 1954 Brown decision[108] were located in states where statutes either required or permitted the operation of racially dual school systems, initially it was believed that the Brown principle applied only to segregation authorized by law. There has been no debate since Brown that that this type of 'de jure segregation' is unconstitutional. It also has been generally accepted that de jure segregation applies to the use

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[105] Id. at 27.

[106] Id. at 28.

[107] For a discussion of legislative action and judicial reaction concerning 'busing', see T. Smedley, "Developments in the Law of School Desegregation," 26 Vanderbilt L. Rev. 405 (1973); "The Nixon Busing Bills," 81 Yale L. J. 1542 (1972); "Busing: A Constitutional Precipice," 8 Suffolk L. Rev. 48 (1972).

[108] Districts from Kansas, South Carolina, Virginia and Delaware were included in the original decision. Brown, 347 U.S. 483 (1954).

of geographical criteria for the assignment of students as a mere subterfuge for gerrymandering the boundaries of the school district to maintain segregated schools.[109]

The term 'de facto segregation' commonly is used to signify situations in which some of the public schools are attended exclusively or predominantly by students of one race, and the conditions result from residential patterns or other factors which are not discriminatory by themselves and do not stem from intentional discriminatory state action. Even though the Supreme Court has not ruled that de facto segregation is unconstitutional and has consistently couched its findings of unlawful segregation in school districts as being 'de jure', the criteria for defining de jure segregation have been gradually broadened.

The de jure/de facto distinction has implications far broader than simply desegregation litigation. A firm judicial definition of 'state action' required to constitute de jure racial discrimination could lead to findings of unlawful state practices on other grounds in public education. Inequalities in fiscal resources among school districts or instructional programs offered throughout the state could be declared unconstitutional if the Supreme Court would define the 'state intent' necessary to create de jure discrimination under the equal protection clause.

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[109] See Clemons v. Bd. of Educ., 228 F. 2d 853 (6th Cir. 1956), cert. denied, 350 U.S. 1006 (1956), where the Sixth Circuit Court of Appeals held for the first time that a zoning system set up by the minicipality was gerrymandering districts as a subterfuge to segregate children by race. See also, Taylor v. Bd. of Educ., 294 F. 2d 37 (2d. Cir. 1961), cert. denied, 368 U.S. 940 (1961).

Perhaps the realization that a possible revolution in school equalization could be initiated by a Supreme Court declaration that de facto segregation should receive the same judicial treatment as de jure segregation has accounted for the Court's hesitancy to deal with the 'de facto issue'. Until the last few years, the Supreme Court has declined to review lower court decisions and thus has condoned the policy of assigning students to neighborhood schools, even though de facto segregation was present.[110]

Several lower courts, however, have not been as cautious as the Supreme Court and have found de jure segregation in school districts as a result of action by state and local education officials even though it was conceded that the segregation originated as de facto conditions. Thus, some courts have not been willing to accept the rationale that 'innocently inherited' segregated schools could negate the state's obligation to eliminate racial discrimination.

In Jackson v. Pasadena City School District, the California Supreme Court referred to de facto segregation in public schools as "an evil" and held that students were entitled to integrated education "even in

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[110]In Bell v. School City of Gary, 324 F. 2d 209 (1963), cert. denied, 377 U.S. 924 (1964), the Seventh Circuit Court of Appeals ruled that the Federal Constitution did not require a school board to destroy or abandon a school system developed under the neighborhood school plan although it resulted in racially imbalanced schools. Three years later, in Deal v. Cincinnati Bd. of Educ., 369 F. 2d 55 (1966), cert. denied, 389 U.S. 847 (1967), the Sixth Circuit Court of Appeals reiterated that there was no affirmative duty upon the school board to alleviate racial imbalance which school authorities had not caused.

the absence of gerrymandering or other affirmative discrimatory conduct by a school board."[111] Likewise, in Pontiac, Michigan, the federal district court claimed that state action and responsibility could be found in most segregated school situations:

> It is neither the court's intent nor desire to place blame that belongs to history; it is the court's obligation and indeed its duty, where the well-being of an entire generation of children is admittedly in jeopardy, to ascertain where duty lies. . . ."[112]

Similarly, the federal district court in Minneapolis held that the Constitution applies equally to all public school systems, regardless of whether segregation is imposed by statute or covertly.[113]

Although there was considerable action in the lower courts,[114] the Supreme Court did not address the constitutionality of de facto segregation until its decision in Swann. Chief Justice Burger, speaking for the Court, stated that a federal court is precluded from imposing on school officials "the affirmative duty to cure racial imbalance that exists through no discriminatory action of state authorities."[115] The Supreme Court reiterated this position in Spencer v. Kugler, but

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[111]59 Cal. 2d 876, 881 (1963). Several years later, the federal district court held that Pasadena's neutral practices of zoning for attendance and prohibiting cross-town busing were in violation of the fourteenth amendment since there was evidence of previous discriminatory practices. Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970).

[112]Davis v. School Dist. of City of Pontiac, 309 F. Supp. 734, 738 (E.D. Mich. 1970), aff'd 443 F. 2d 573 (6th Cir. 1971), cert. denied, 404 U.S. 913 (1971).

[113]Booker v. Special School Dist. No. 1, Minneapolis, Minn., 351 F. Supp. 799 (D. Minn. 1972).

[114]See Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969); United States v. School Dist. 151 of Cook County, Illinois, 286 F. Supp. 786 (N.D. Ill. 1968), aff'd 404 F. 2d 1125 (1969), cert. denied, 402 U.S. 943 (1971); text with notes 111-12, supra.

[115]402 U.S. 1, 18 (1971).

the dissent of Justice Douglas paved the way for future bridging of the distinction between de facto and de jure segregation. He asserted that there were de facto situations which would violate the Brown declaration "that separate educational facilities are inherently unequal."[116]

The expansion of the concept of de jure segregation from the direct desegregation order of Brown to the South, toward a view encompassing total national integration as espoused by Justice Douglas in Spencer, has set the stage for a possible constitutional crisis over the use of busing.[117] Courts in the northern and western sections of the nation have become increasingly inclined to find the existence of de jure segregation, even when no state law requiring or permitting the operation of racially dual school systems has been in effect for half a century or more.[118]

In Johnson v. San Francisco Unified School District, District Judge Weigel remarked that [t]he term de jure need not be one stigmatizing school authorities."[119] He further elaborated:

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[116]404 U.S. 1023, 1031-32 (1972) (Douglas, J., dissenting).

[117]For a discussion of proposed constitutional amendments limiting 'busing' to achieve desegregation, see "Democracy: The Legal and Practical Problems of School Busing," 3 Human Rights 53-84, Summer, 1973.

[118]See Soria v. Oxnard School Dist. Bd. of Trustees, 328 F. Supp. 155 (C.D. Cal. 1971); People v. San Diego Unified School Dist., 19 Cal. App. 3d 252 (Ct. App. 1971); United States v. Texas Educ. Agency, 467 F. 2d 848 (5th Cir. 1972); Cisneros v. Corpus Christi Indep. School Dist., 467 F 2d 142 (5th Cir. 1972), cert. denied, 413 U.S. 920 (1973); School Comm'rs of Boston v. Bd. of Educ., 302 N.E. 2d 916 (D. Mass. 1973); Moss v. Stamford Bd. of Educ., 356 F. Supp. 675 (D. Conn. 1973).

[119]339 F. Supp. 1315 (N.D. Cal. 1971), app. for stay denied, 404 U.S. 1215 (1971).

> In the context of segregation, it means no more or less than that school authorities have exercised powers given them by law in a manner which creates or continues or increases substantial racial imbalance in schools. It is this governmental action, regardless of the motivation for it which violates the Fourteenth Amendment.[120] [emphasis added]

Proponents of expanding the de jure criteria have claimed that affirmative state action can be found in almost any situation where segregated schools do, in fact, exist.[121] Prior to the late 1940s, housing patterns were controlled in most sections of the country through the device of restrictive convenants based on race. These covenants were sanctioned by the government, and they created racially and economically homogeneous neighborhoods and schools. Thus, it can be argued that segregated schools resulting from the above circumstances should be considered as de jure in nature as those schools formerly operating under a dual system.[122] This type of segregation is particularly significant in large metropolitan areas where there is a high percentage of black students who are mainly concentrated in well-defined residential sections of the central city, while most of the white students live in virtually all-white suburban areas.[123]

The first desegregation case concerning a school district outside the South to reach the Supreme Court was handed down in June, 1973, involving the Denver public schools. In Keyes v. School District No. 1,

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[120] Id.

[121] See "Busing: A Constitutional Precipice," supra note 107, at 57-59.

[122] Id.

[123] See discussion of metropolitan desegregation remedies, text accompanying notes 136-59, infra.

the Tenth Circuit Court of Appeals found that Denver was operating an impartially administered neighborhood school system.[124] Although the Denver schools were racially imbalanced,the appellate court reasoned that they were maintained on "racially neutral criteria," and thus constituted de facto segregation.[125] However, the Supreme Court remanded the case back to the district court, placing the burden on the school district to prove that the school construction and attendance zone policies were not designed in order to confine minority children to a few schools. Even though the Supreme Court did not rule that Denver's segregation was de jure, it did recognize that practices of school officials which produce segregated school conditions are just as much 'state action' as statutorily required dual systems.[126] Thus, the Court concluded that 'operational de jure segregation' could be found in states other than the seventeen which maintained segregated school districts by law in 1954.[127]

Justice Brennan, writing for the Court, emphasized that the "differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate."[128] Although this statement may appear to have settled the controversy over defining 'de facto' segregation, it gave no specific criteria for determining the existence of 'state intent'. In his separate opinion, Justice Douglas

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[124]313 F. Supp. 90 (D. Colo. 1970); aff'd in part, rev'd in part, 445 F. 2d 990 (10th Cir. 1971), modified and remanded, 413 U.S. 189 (1973).

[125]Id., 445 F. 2d 900.

[126]Id., 413 U.S. 201-202.

[127]Id. at 201-203.

[128]Id. at 208.

recognized that all functions of a school board, such as drawing boundary lines, locating schools, assigning students, and preparing budgets, constitute 'state action'.[129] He further stressed that for purposes of equal protection review, the courts should make no distinction between de facto and de jure segregation, "for each is the product of state actions or policies."[130]

Justice Powell also wrote a separate opinion in which he condemned the double standard for desegregation applied in the North and South. He claimed that the de jure/de facto distinction had been "nurtured by the courts and accepted complacently by many of the same voices which denounced the evils of segregated schools in the South."[131] He referred to the dual standard as a "legalism rooted in history rather than present reality" and further contended:

> The principal reason for abandonment of the de jure/de facto distinction is that, in view of the evolution of the holding in Brown I into the affirmative duty doctrine, the distinction can no longer be justified on a principled basis.[132]

Avid egalitarians, who had hoped for an ultimate answer to the unconstitutionality of segregation outside the South, found the Denver decision to be somewhat anticlimatic.[133] The Court actually hedged on addressing directly the unconstitutionality of de facto segregation and

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[129] Id. at 215 (Douglas, J., separate opinion).

[130] Id. at 216.

[131] Id. at 219 (Powell, J., concurring in part, dissenting in part).

[132] Id. at 224.

[133] See J. Hogan, The Schools, the Courts, and the Public Interest 34-35 (1974).

indicated by setting down complicated standards for judging northern segregation that it did not intend to be as strict with the remainder of the country as it had been with the southern states.

Metropolitan Remedies

Since the state has plenary power over education within its boundaries, there is no legal controversy over the fact that local school districts are creations of the state legislature.[134] The Supreme Court also has held that subdivision of a school district into separate districts, when the effect would be the perpetuation of racial segregation, is unconstitutional.[135] Thus, the question follows of how far district lines must be disregarded for the state to fulfill the constitutional mandates of equal protection of the laws? Intradistrict desegregation remedies have proven ineffective in many large metropolitan areas because the movement of whites to the suburbs has left a predominantly black city school population.

The argument that district lines should be disregarded in seeking desegregation remedies is based on the premise that the appropriate test of the constitutionality of school officials' actions is their operative effect, rather than whether they are the product of racial hostility. Also, the contention is made that the state has no compelling

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[134] See State ex rel. Clark v. Haworth, 122 Ind. 462 (1890); Padberg v. Martin, 225 Or. 135, 357 P. 2d 255 (1960).

[135] See United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972). The latter case was the first serious split in opinion (5-4) experienced by the Supreme Court in reaching its decision on the merits of a desegregation case. Since then, in desegregation litigation, a divided Court has become the rule rather than the exception.

interest in maintaining racially separate school systems within a single biracial community. It has been further asserted that metropolitan plans would be logistically easier to implement than individual plans for small adjoining districts and would offer greater prospects for stable school integration.[136]

Circuit courts of appeal have reached different conclusions concerning the state's responsibility to merge school districts or transport students across district lines in order to eliminate segregation and inequalities which have resulted from housing patterns and the accompanying economic and social factors. In a case involving Indianapolis, the Seventh Circuit Court of Appeals upheld the district court's ruling that the state had the power to initiate necessary measures to eliminate unconstitutional segregation, including "revision of local laws and regulations and school districts."[137]

Judge Pell, writing for the appellate court, affirmed that the evidence of both "intent" and "causation" was substantial enough to support the district court's finding of de jure segregation in Indianapolis.[138]

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[136]See W. Taylor, "Metropolitan-Wide Desegregation," Perspective on Busing: Inequality in Education, No. 11, Harv. Un. Center for Law & Educ., March, 1972.

[137]United States v. Bd. of Comm'rs, 332 F. Supp. 655, 678 (S.D. Ind. 1971), aff'd 474 F. 2d 81, 84 (7th Cir. 1973), cert. denied, 413 U.S. 920 (1973). See also, School Town of Speedway v. Dillin, 407 U.S. 920 (1972).

[138]Id., 474 F. 2d 81, 84 (7th Cir. 1973). The Indiana legislature had merged all municipalities in Marion County, including Indianapolis, into one government for municipal purposes in 1969. However, school district lines were not changed, which resulted in several suburban districts and the Indianapolis district all being located within the Marion County boundaries.

Although the court recognized that student reassignment among the city schools was a temporary expedient and that resegregation soon would occur because of the accelerating 'white flight', the court only recommended that consideration be given to seeking cross-district remedies which would include the city and some of the surrounding area. Thus, the Seventh Circuit Court of Appeals raised the issue, but it did not rule that the state was required to disregard its various political subdivisions in eradicating school segregation. However, since litigation is still in progress concerning the Indianapolis area, perhaps the appellate court will take a more definitive stand on the issue in the future.[139]

The Fifth Circuit Court of Appeals has been active in litigation concerning the Atlanta public schools, which has been in progress for over fifteen years. With each Supreme Court reinterpretation of the mandates of Brown, the Atlanta school system has returned to court, and the litigation has gone back and forth between the court of appeals and the district court in attempts to meet desegregation requirements.

In 1971, with the city on the brink of becoming all black, the district court rejected a plan for busing pupils on the rationale that

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[139]After the Supreme Court denied certiorari, the case was returned to the district court for implementation. Judge Dillin, writing for the district court, did not order a metropolitan desegregation plan, but noted that the court could devise such a plan if the legislature failed to act. In reemphasizing that the state had the responsibility to act affirmatively to eliminate segregation, the court pointed out that one alternative would be to maintain the school districts and transport students among them in order to meet constitutional requirements, 368 F. Supp. 1191, 1205 (1973). The district court ruling has returned to the Seventh Circuit Court of Appeals for review.

the expense coupled with the time and distance of pupil travel would outweigh the benefits of achieving racial balance in the schools.[140] The district court subsequently declared Atlanta to be a unitary system, and although it mentioned that consolidation of Atlanta and Fulton County school districts should be studied, it did not rule to that effect.[141] The court accepted the "Atlanta Compromise" which provided for a black superintendent, a 50 percent black administration, and a minimum busing of students.[142] Although the compromise agreement has been appealed,[143] for all practical purposes the Atlanta school district has been allowed to become almost totally black and segregated.

The Fourth Circuit Court of Appeals, in desegregation litigation involving Richmond, Virginia, firmly stated that a federal court could not compel one of the states to restructure its internal government by merging three districts for the purpose of achieving racial balance in public schools, unless there was "invidious" state discrimination which resulted in the racial composition of the three districts.[144] In this case the appellate court overturned the district court's order for

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[140]Calhoun v. Cook, 332 F. Supp. 804, 804-10 (1971). The court stressed that since Atlanta had gone from a racial composition of 70 percent white and 30 percent black in 1958 to a ratio of 70 percent black and 30 percent white in 1971, the problem was not desegregation, but how to prevent resegregation.

[141]Id., 362 F. Supp. 1249 (1972).

[142]Id.

[143]Calhoun v. Cook, 487 F. 2d 680 (1973).

[144]Bradley v. School Bd. of Richmond, Virginia, 338 F. Supp. 67 (E.D. Va. 1971), rev'd 462 F. 2d 1058,1070 (4th Cir. 1972), aff'd mem., by an equally divided Court, 412 U.S. 92 (1973).

consolidation of city and suburban school districts, and based its decision on the finding of no illegal purpose rather than on the existence of segregation in fact.[145] In May, 1973, the Supreme Court ended the lengthy litigation over Richmond schools by dividing equally on the case, thus upholding the Fourth Circuit ruling.[146]

In contrast to the Fourth Circuit decision, the Sixth Circuit Court of Appeals concluded by a six to three margin that the district court in Detroit was not confined to the boundary lines of the city in fashioning equitable relief to achieve desegregation.[147] The appellate court agreed with the district court that no effective integration could take place within Detroit's predominantly black school system, so the remedy should include the exchange of pupils among Detroit and 53 suburban school districts.[148] While the court of appeals affirmed the principle of metropolitan busing, it stayed the implementation of specific busing plans until the Supreme Court reviewed the case.[149]

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[145] Id., 462 F. 2d 1970. Arguments have been raised alleging that the Fourth Circuit Court of Appeals confused the existence of a constitutional violation with the determination of the appropriate scope of a remedial decree. For discussion of this issue, see "Consolidation for Desegregation: The Unresolved Issue of the Inevitable Sequel," 82 Yale L. J. 1659, 1682-84 (1973).

[146] Id., 412 U.S. 92. Justice Powell disqualified himself from participating in the decision because of his prior membership on the Richmond School Board and the Virginia State Board of Education, The Courier Journal, May 22, 1973, at A, 1.

[147] Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971), 345 F. Supp. 914 (E.D. Mich. 1972), aff'd 484 F. 2d 215 (6th Cir. 1973), rev'd 94 S. Ct. 3112 (1974).

[148] Id., 484 F. 2d 215.

[149] Id. The appellate court vacated the district court's order for the purchase of 295 school buses.

Many champions of public school equalization had high hopes that the Supreme Court's ruling concerning Detroit would settle the lingering questions about the state's responsibility in desegregation and also would provide an impetus for eliminating all types of discriminatory practices in public education. However, the Court chose to base its decision on its findings of 'guilt' connected with the segregation in the Detroit area. Since the five to four majority concluded that the 53 outlying school districts had not been responsible for the segregated status of the city schools, the Court ordered a remedy applying solely to the Detroit system.[150]

In holding that the lower courts had erred in ordering remedial action broader than the scope of the constitutional violation, the Supreme Court concluded that there was no basis for an interdistrict remedy when the facts did not indicate an interdistrict violation.[151] Although the Court emphasized that no state law is above the Constitution and that school district lines are not sacrosanct if they conflict with the fourteenth amendment, the majority espoused a great reverence for local control of schools and stated that school district lines may not "be casually ignored or treated as a mere administrative convenience . . . contrary to the history of public education in our country."[152] The Court specifically held that before an interdistrict remedy could be imposed, it must be shown that "there has been a constitutional violation within

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[150] Id., 94 S. Ct. 3127.

[151] Id.

[152] Id. at 3125.

one district that produces a significant segregative effect in another district" or that "district lines have been deliberately drawn on the basis of race."[153]

As noted in several dissenting opinions,[154] it is difficult to reconcile the Denver and Detroit decisions, which were handed down by the Supreme Court only a year apart. In the Denver decision, the Court emphasized that 'state action' to perpetuate segregation could be found in de facto situations and that the manner in which school officials established attendance zones could reflect an "intent to segregate."[155] However, in the Detroit case, the majority focused on its finding, or lack of finding, of intentional discriminatory acts on the part of the local districts themselves. Also, concerning Denver, the Court declared that administrative ease of operation could not justify discriminatory practices, while in the Detroit decision, the majority dealt at length with the administrative difficulties that would accompany an interdistrict remedy.[156] The two decisions also revealed incongruency in the judicial posture toward 'local control' in public education. While the Denver Court emphasized the state's responsibility for public schools, the Detroit majority gave more attention to praising the tradition of 'local control' in education.

Although the Detroit ruling did not definitively settle the de jure/de facto controversy or the issue of crossing school district lines to

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[153] Id. at 3127.

[154] Id. at 3133 (Douglas, J., dissenting); id. at 3136 (White, J., dissenting); id. at 3145 (Marshall, J., dissenting).

[155] Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973).

[156] Milliken v. Bradley, 94 S. Ct. 3112, 3125 (1974).

eradicate discrimination, this decision may encourage other districts to maintain de facto segregation and thus place a damper on efforts to equalize educational opportunities.[157] Justice Marshall, in his dissenting opinion, voiced his fears concerning the implications of the Detroit ruling:

> Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities--one white, the other black--but it is a course, I predict, our people will ultimately regret.[158]

If the five-four majority had ruled the opposite way in Detroit, the implications for public school equalization would have been far broader than merely requiring integration. No doubt, the small, wealthy districts surrounding Detroit would have eventually consolidated with the city system if the Court had mandated interdistrict busing. This would have leveled the large disparities among the schools in available

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[157]Possibly the Detroit decision has contributed to the violent public protest against court-ordered desegregation in the Boston schools, which has made national headlines and resulted in school boycotts and closings. In June, 1974, Judge Garrity delivered the ruling for the Massachusetts district court that the Boston School Committee had a "constitutional duty to desegregate" and comply with the state racial balance plan (Morgan v. Hennigan, Civil No. 72-911-G, June 21, 1974). See The Boston Globe, June 22, 1974, at 1, 5, for the complete text of the decision. Since the Detroit decision was handed down by the Supreme Court one month later, perhaps it encouraged defiance by the emotionally charged whites who felt that no affirmative steps were necessary to achieve racial balance in situations of de facto segregation. For further discussion of public reaction to desegregation in Boston, see D. Robinson, "School Storm Centers: Boston," Phi Delta Kappan, December, 1974, at 269.

[158]Milliken v. Bradley, 94 S. Ct. 3112, 3161 (1974) (Marshall, J., dissenting).

financial resources and would have increased operational efficiency by eliminating the duplication of services among the smaller districts.[159]

It is difficult to predict the future stance of the Supreme Court in requiring states to redesign school districts or cross district lines in order to eliminate school segregation. Since the protection of minority rights has become so entwined with the remedial measures employed, the mounting public pressure and congressional legislation concerning 'busing' are bound to influence the Court's posture. Furthermore, the issue of disregarding school district lines for desegregation purposes cannot be divorced from the state's responsibility to reorganize school systems in order to eradicate other inequities in public education. If all states were required to shoulder the responsibility for eliminating racial discrimination in the schools, regardless of its cause and even if the process entailed consolidating school districts, would the Constitution place similar obligations on the states to take necessary steps to equalize financial resources among districts

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[159]Another Sixth Circuit case involving interdistrict busing is presently being appealed to the Supreme Court. In 1973, the appellate court ordered the Louisville, Kentucky school system and the surrounding Jefferson County district to exchange pupils in order to achieve desegregation in the metropolitan area. Newburg Area Council v. Bd. of Educ. of Jefferson County, 489 F. 2d 925 (6th Cir. 1973). The court held that "[t]here is nothing so sacrosanct about school district lines . . . that they may be permitted to curtail the board equity powers of the federal court in implementing a mandate of the Federal Constitution," id. at 932. Due to the Supreme Court ruling concerning Detroit, the Louisville case was remanded back to the lower courts, and in December, 1974, the Sixth Circuit Court of Appeals upheld its previous decision. See The Courier Journal, December 12, 1974, at A, 23, for the entire text of the Sixth Circuit ruling. Although the appellate court distinguished the Louisville situation from Detroit on several grounds, it is doubtful that this case will provide an opportunity for the Supreme Court to take an affirmative stand sanctioning interdistrict remedies, because the two districts involved have started merger proceedings which would moot the issue of interdistrict desegregation.

or to ensure adequate program offerings or to promote efficiency in the organization and administration of the schools?

These issues all lead back to one central question: What is the nature of the state's constitutional duty to provide educational opportunities for all its residents? Thus, the evolution of the Supreme Court's interpretation of the rights secured by the equal protection clause cannot easily be separated from the duty imposed on the states to guarantee these rights.

Importance of Precedents Established in Racial Discrimination Cases

The significance of the cases involving racial discrimination should not be underestimated in analyzing an individual's constitutional right to equal educational opportunities. After all, the Brown decision did initiate the egalitarian revolution and opened the schoolhouse door to the critical eye of the federal judiciary. Some dedicated egalitarians would go so far as to say that the holding in Brown should be viewed as a mandate for states to equalize all aspects of public education and eliminate all discrimination in public schools, not simply racial discrimination.[160] TenBroek has even asserted that 'equal protection of the laws' espoused in Brown reaches beyond public schools to all services provided by the state, and that it may take many years for the full impact of this decision to be realized.[161]

One important feature of the desegregation litigation is that it caused the judiciary to address the meaning of 'state action' under the

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[160] See J. Coons et al., supra note 2, at 404.

[161] J. tenBroek, Equal Under Law 15-16 (1965).

fourteenth amendment. Justice Powell remarked in 1973 that there "is state action in every school district in the land."[162] He contended that since public schools have always been funded and operated by states and their local subdivisions, school authorities have contributed where segregated school districts still prevail.[163] Justice Douglas also claimed that "[e]ach school board performs state action for Fourteenth Amendment purposes when it draws the lines that confine it to a given area, when it builds schools at particular sites, or when it allocates students."[164] The desegregation cases have caused the courts to place more of the responsibility for discriminatory public school practices on the states, where it belongs. Thus, the concept of 'state neutrality' has slowly given way to the doctrine of judicially required 'affirmative state action' to eliminate unlawful school segregation.[165]

The desegregation litigation during the past two decades has also nurtured a change in the Court's attitude toward its responsibility in protecting constitutional rights in the educational arena. The former judicial 'laissez faire' posture toward the schools has been replaced in many situations by strict protection of individual rights and close supervision of remedial decrees.[166] At first, the judiciary was hesitant

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[162]Keyes v. School District No. 1, 413 U.S. 189, 227 (1973) (Powell, J., concurring in part, dissenting in part).

[163]Id. at 224.

[164]Milliken v. Bradley, 94 S. Ct. 3112, 3135 (1974) (Douglas, J., dissenting). For a discussion of inconsistencies in Supreme Court evaluation of 'state action', see text with note 418, infra.

[165]See Green v. County School Bd. of New Kent County, 391 U.S. 430, 437-38 (1968).

[166]See generally, J. Hogan, supra note 133, Chapter 2; A. Cox, supra note 38, at 93.

to order specific remedial measures and emphasized the exposure of constitutional violations, while leaving the details for effecting a remedy to local school authorities. However, many federal courts have increasingly broadened their basis for finding discriminatory action, and have become more assertive in ordering definite remedial plans which must be implemented under the supervision of the courts. This trend has not been limited to cases involving racial discrimination, and in many other situations the burden of proof has been shifted from the party attacking the legality of school policies to the school authorities for justification of their actions. Thus, discriminatory practices against pregnant students, handicapped students, female students, and indigent students as well as gross inequalities among the schools within a state are being revealed and often subjected to strict review by the courts.

As mentioned many times throughout this study, the Brown decision did decree that once the state has undertaken to provide public education, "it is a right which must be made available to all on equal terms."[167] Although Justice Powell stated in Rodriguez that education is not a constitutionally protected right,[168] only three months later, he asserted definitively:

> I would now define it as the right, derived from the Equal Protection Clause, to expect that once the State has assumed responsibility for education, local school boards will operate integraded school systems within their respective districts.[169]

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[167]Brown, 347 U.S. 483, 493 (1954).

[168]411 U.S. 1, 35 (1973).

[169]Keyes v. School Dist. No 1, 413 U.S. 189, 225-26 (1973) (Powell, J., concurring in part, dissenting in part).

Thus, Justice Powell seems to have concluded that there is no constitutional right to an education, but if the state provides such opportunities, there is a constitutional right to an integrated education. Since inconsistencies can be noted in the opinions of individual justices from one case to the next, it seems unlikely that closure will be reached soon in the debate over the perimeters of the citizen's constitutional rights to public education under the equal protection clause.

The troublesome de jure/de facto controversy surfaced by the desegregation litigation also has implications for the entire field of equality in education. Since the finding of de jure discrimination seems to be hinging on proof of "intent" to discriminate by state officials, the Supreme Court has a powerful tool to use in hastening equalization in education by finding de jure discrimination based on race or wealth or other classifying factors.[170] The Supreme Court's final interpretation of the extent of state involvement necessary to produce de jure discrimination and its determination of the minimum remedial measures required to satisfy equal protection of the laws under the fourteenth amendment could well pose the greatest challenges to the Court since Chief Justice Marshall assumed the power of judicial review.[171]

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[170]Hogan has noted that if the Brown decision had been delivered on some other grounds or if Rodriguez had been decided differently, it is quite possible that the de jure/de facto distinction would never have arisen. J. Hogan, supra note 133, at 56.

[171]Marbury v. Madison, 5 U.S. (1 Cranch 137 (1803). See text with note 91, supra.

Equal Protection and Wealth Discrimination in Education

Although federal litigation involving racial discrimination in schools has a rather lengthy procedural history, the federal judiciary only recently has been called upon to evaluate claims of wealth discrimination in education as violating the equal protection clause. These legal controversies over the validity of state financing schemes for public schools delve into the sensitive area of the state's power to regulate its method of taxation and distribution.

Early Litigation On Behalf Of The Taxpayer

Early cases in this realm usually were initiated in state courts by taxpayers who contested the state's method of redistributing tax revenues to the school districts within the state. Most of the early litigation actually challenged state efforts to equalize educational expenditures among districts through its method of allocating public funds. The courts generally held that matters of taxation were within the powers of the state legislature and that the state only had to demonstrate a 'rational relationship' between the classifications employed and the state purposes.

In 1912, plaintiffs attacked Maine's method for distributing tax revenues for public education because it discriminated against townships, to the advantage of cities, towns, and plantations. The Supreme Court of Maine held that since the taxes were collected for a public purpose, it was not necessary for them to be distributed in an equal manner: "Inequality of assessment is necessarily fatal, inequality of distribution is not, provided the purpose be the public welfare."[172] The Court

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[172]Sawyer v. Gilmore, 109 Me. 169, 83 A. 673 (1912).

concluded if the legislature did not use wise discretion and sound judgment that relief was to be gained at the ballot box and not in the courts.

In Miller v. Korns, the Ohio Supreme Court upheld the state's public school financing scheme which distributed funds unevenly among districts. The court reasoned that the state constitutional mandate for a "thorough and efficient system of schools" justified uneven distribution, as greater expenses might arise in the poor districts or parts of the large cities.[173] A year later, the Oklahoma Supreme Court also relied on the state constitutional provision to establish a "system" of public schools as requiring "some degree of uniformity and equality of opportunity."[174] In this case, plaintiffs challenged a law providing special state aid for 'weak' school districts. The court concluded that the legislature had the power and duty to appropriate from state funds the money necessary for each school district to maintain a reasonable school term.

In Hess v. Mullaney, the federal judiciary was called upon to review the legality of the plan used in Alaska for redistributing tax revenues. The Ninth Circuit Court of Appeals clearly stated that it would not interfere with legislative discretion in this area, unless there was an "explicit demonstration" that constitutional rights had been violated:

> Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed

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[173]107 Ohio St. 287, 240 N.E. 773 (1923).

[174]Miller v. Childers, 107 Okl. 57, 238 P. 204 (1924).

> out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.[175]

Thus, the Ninth Circuit Court of Appeals espoused a position similar to the state courts in concluding that the legislature had a better understanding of local conditions than did the judiciary. It was presumed, therefore, that the legislative act was constitutional unless the one attacking it could prove that it was arbitrary, capricious, or resulted in invidious discrimination.[176]

Litigation on Behalf of the Interests of the Student

More recently, litigation has attacked state financing schemes as unconstitutional because they make the student's educational expenditures dependent on his place of residence or on the wealth of his parents.[177] Since education is a state responsibility, it is argued that some students are denied equal protection of the laws because of the inequality in fiscal resources created by the heavy reliance on local property taxes to finance public education.

Wise has described the legal rationale for this equal protection claim based on the Supreme Court precedents established in cases involving racial discrimination, criminal justice, and voting rights.[178] As discussed in the previous section, desegregation cases have invalidated discrimination in public education on the basis of race. The

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[175]15 Alaska 40, 213 F. 2d 635, 643 n. 7 (9th Cir. 1954), cert. denied sub nom. Hess v. Dewey, 348 U.S. 836 (1954).

[176]Id., 213 F. 2d 643-45. See also Dean v. Coddington, 81 S. D. 140, 131 N.W. 2d 700 (1964).

[177]Also, some cases have alleged that state financing plans do not provide educational programs appropriate to the needs of the students. See text with note 189, infra.

[178]A. Wise, Rich Schools Poor Schools (1968).

cases involving equal access to the courts have established the precedents that an indigent defendant appealing his conviction must be provided with a transcript of the proceedings of the trial court[179] and with counsel on appeal,[180] and that in civil cases indigents cannot be discriminated against by the imposition of high filing fees.[181] In the voting cases, the Supreme Court has established that the payment of a poll tax[182] or the ownership of property[183] may not be prerequisites to exercise of the franchise. Wise has analyzed discriminatory practices based on wealth which have been invalidated by the Supreme Court, compared the interests at stake in those cases with education, and concluded that the system of funding public education in most states (excluding Hawaii[184]) denies equal protection of the laws.[185] Several of the cases testing the constitutionality of state financing schemes warrant discussion due to their analysis of the individual's right to equal educational resources.

The Florida Case

In Hargrave v. Kirk, the three-judge federal district court found the ceiling placed on the millage rate a county could tax for education to be "irrational" and held that it prevented "the local boards from

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[179]Griffin v. Illinois, 351 U.S. 12 (1956).

[180]Douglas v. California, 372 U.S. 353 (1963).

[181]Boddie v. Connecticut, 401 U.S. 371 (1971).

[182]Harper v. Bd. of Elections, 383 U.S. 663 (1966).

[183]Cipriano v. City of Houma, 395 U.S. 701 (1969).

[184]In Hawaii, schools are maintained and operated by the state and entirely funded by revenues collected at the state level.

[185]Wise, supra note 178, Chapter 9.

adequately financing their children's education."[186] The plaintiffs asked the trial court to declare education a 'fundamental interest', but the court declined with the following rationale:

> Having concluded that there is no rational basis for the distinction which the legislature has drawn, we decline the invitation to explore the fundamental right-to-education thesis, and thus we do not reach the more exacting 'compelling interest' approach.[187]

In this case for the first time a federal court used the equal protection clause to invalidate a state's educational financing scheme. The Supreme Court, however, vacated the judgment on procedural grounds, but it did acknowledge that state aid to the local districts more than compensated for the loss of funds caused by the limitation on the millage rate in the counties.[188] If the decision had been allowed to stand, it actually would have disequalized educational expenditures within the state, rather than equalized them. Thus, this case also served as a signal that members of the judiciary often are unknowledgeable concerning the operational effect of state plans for financing public schools.

The Educational Needs Issue

In McInnis v. Shapiro, plaintiffs claimed violation of the equal protection clause because the level of per pupil educational expenditures was not related to the educational needs of the students.[189] Plaintiffs further alleged that the method of funding public education in Illinois

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[186] Hargrave v. Kirk, 313 F. Supp. 944, 949 (M.D. Fla. 1970), vacated and remanded sub nom. Askew v. Hargrave, 401 U.S. 476 (1971).

[187] Id., 313 F. Supp. 948.

[188] Id., 401 U.S. 476 (1971).

[189] 293 F. Supp. 327 (N.D. Ill. 1968), aff'd sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969).

did not consider the added costs necessary to educate children from culturally and economically deprived areas. However, the district court reasoned that the educational needs issue[190] was nonjusticiable due to a lack of manageable standards "by which a court can determine when the Constitution is satisfied and when it is violated."[191] The term educational needs was described as a "nebulous concept" which could reflect the interaction of such complex factors as the quality of teachers, the student's ability, the school physical plant, and the student's environment and background. The court, therefore, concluded that "[e]valuation of these variables necessarily requires detailed research and study, with concomitant decentralization so each school and pupil may be individually evaluated."[192] The only possible standard that the court could ascertain was the unacceptable criterion that each pupil must receive the same dollar expenditure.[193]

A similar approach by plaintiffs resulted in a comparable judicial reaction from a three-judge panel in Burruss v. Wilkerson.[194] Plaintiffs were not from poor school districts in Virginia, but complained that their districts had disproportionate numbers of students with special problems which required additional financial resources. Although the federal district court commended the desire to equalize educational

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[190] See E. Cubberly, School Funds and Their Apportionment, Chapter XIII (1905).

[191] 293 F. Supp. 327, 335 (N.D. Ill. 1968).

[192] Id. at 329, n. 4.

[193] Id. at 335.

[194] 310 F. Supp. 572 (W.D. Va. 1969), aff'd mem., 397 U.S. 44 (1970).

funding according to the needs of pupils, it held that "the courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the state."[195]

Shanks has observed that if the McInnis and Burruss cases had been successful, they would have opened the door to a flood of constitutional claims involving state financing plans for public education. Under such precedent, he has questioned how criteria would be established for distributing funds among ghetto versus suburban children or among handicapped versus normal children. Furthermore, he has raised the issue of whether cities would then be entitled to "plead poverty" since there are greater demands on local taxes in the cities than in other areas of the state.[196]

The California Rule

Serrano v. Priest, although a state supreme court decision, is particularly relevant because it presented legal arguments used in subsequent federal litigation concerning state financing of public education. Justice Sullivan, writing for the California Supreme Court, announced that education "is a fundamental interest" under the Federal Constitution.[197] If this ruling had been upheld by the United States Supreme Court, then all school policies and practices, challenged under the fourteenth amendment, would have become the target for strict judicial scrutiny.

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[195] Id., 310 F. Supp. 574.

[196] H. Shanks, "Equal Education and the Law," 39 American Scholar 255, 269 (1970).

[197] 5 Cal. 3d 584, 96 Cal. Rptr. 601, 604, 487 P. 2d 1241 (1971).

The California Supreme Court unequivocally ruled that the inequities in the state plan for financing public schools violated the equal protection clause:

> We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing.[198] [emphasis added]

In declaring wealth to be a 'suspect classification', the court relied on Harper v. Virginia State Board of Elections, where the United States Supreme Court held that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."[199] Thus, the California Supreme Court reasoned that the state was violating the Constitution by using 'wealth' as a basis for classification in financing public schools.[200]

The court also relied on prior Supreme Court decisions to conclude that state discrimination on a geographical basis should be strictly reviewed under the equal protection clause. The court cited the desegregation ruling which invalidated state efforts to close schools in one county while other public schools in the state remained open.[201] The court also cited cases dealing with apportionment, where the

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[198] Id., 96 Cal. Rptr. 604.

[199] 383 U.S. 663, 668 (1966).

[200] 96 Cal. Rptr. 601, 610-615. See A. Wise, supra note 178, for further discussion of legal precedent used as a rationale in the Serrano decision.

[201] Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964).

Supreme Court established that arbitrary boundary lines of local political subdivisions of the state could not be grounds to justify discrimination among the state's citizens.[202] Thus, the California Supreme Court concluded: "If a voter's address may not determine the weight to which his ballot is entitled, surely it should not determine the quality of his child's education."[203]

The California Supreme Court did not rule on the merits of the Serrano case, but merely substantiated why the lower court's judgment dismissing the case was in error. Thus, the case was remanded to be tried on its merits, and the trial court was instructed to invalidate the state's system of financing education if the asserted discrimination based on wealth could be confirmed.[204] The trial court was able to verify the allegations and accordingly concurred with the higher court's conclusions.[205]

In invalidating the California system of financing public education, the Serrano ruling did not require uniform educational expenditures.

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[202]Baker v. Carr, 369 U.S. 186 (1962).

[203]96 Cal. Rptr. 601, 622 (1971).

[204]Id. at 626.

[205]Civil Action No. C-938254 (Cal. Super. Ct., Los Angeles County, April 10, 1974). In light of the Rodriguez ruling (see text with note 227, infra) the trial court's decision on the merits of the case had to be grounded in state law. Since California's constitution contained no explicit language concerning 'education as a right of the people', Assemblyman Alex Garcia introduced a constitutional amendment to the California Legislature which included 'obtaining an education' as an inalienable right of the people. See J. Hogan, supra note 133, at 60, for a discussion of the amendment.

The court ordered no specific scheme and left most decisions concerning remedial measures in the hands of state authorities. However, it did rule that the amount of public money spent on a student's education could not be dependent on the wealth of his school district. Although this decision has been called a victory for poor children, it actually was a victory for all children living in poor school districts in California.

Van Dusartz v. Hatfield

The federal district court in Minnesota followed the Serrano ruling and reiterated that pupils in public schools have a right under the equal protection clause to have their level of educational spending unaffected by the taxable wealth of the school district wherein they reside.[206] The court acknowledged the controversy concerning the degree to which money affects the quality of education, but it concluded that the correlation between expenditure per pupil and the quality of education must be high:

> To do otherwise would be to hold that in those wealthy districts where the per pupil expenditure is higher than some real or imaginary norm, the school boards are merely wasting the taxpayers' money.[207]

The court further held that both a 'fundamental interest' and 'suspect classification' were involved in this case. In discussing the fundamentality of education, the court recognized the unique impact of education on "the mind, personality, and future role" of the individual in his life.[208]

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[206]Van Dusartz v. Hatfield, 334 F. Supp. 870, 872 (D.C. Minn. 1971).
[207]Id. at 874.
[208]Id. at 875.

Since the state had created and designed the school districts, the court concluded that the variations in fiscal resources were imposed by the state and resulted in classification of students according to the wealth of the school districts. Although the court held that wealth was a 'suspect classification', it clearly indicated that its suspect nature was due to the fundamental interest of education which the wealth discrimination affected. Thus, the court admitted that discrimination based on wealth would not necessarily be considered 'suspect' in all circumstances.[209]

The court did not specify a particular financing plan and left the legislature wide discretion in devising a constitutional financing scheme for public schools:

> [I]t is the singular virtue of the Serrano principle that the state remains free to pursue all imaginable interests except that of distributing education according to wealth. . . . [T]he fiscal neutrality principle . . . openly permits the state to adopt one of the many optional school funding systems which do not violate the equal protection clause.[210]

Although the court retained jurisdiction of the case and deferred further action until after the Minnesota legislative session, the subsequent Supreme Court Rodriguez decision caused the case to be dismissed as a moot issue under the Federal Constitution.[211]

Robinson v. Cahill

In Robinson v. Cahill, the New Jersey Superior Court cited and followed the 'fundamental interest' test set forth in California in finding

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[209] Id. at 875-76.

[210] Id. at 876-877.

[211] J. Hogan, supra note 133, at 70.

that the New Jersey system of funding public schools violated the equal protection clause.[212] The 34-page opinion of the court explored the meaning of the state constitutional provision for a "thorough and efficient system of education" and evaluated the obligations placed on the state by this mandate. The court concluded that the constitutionally required "thorough education" was afforded to some pupils but denied to others, thus resulting in discrimination which violated equal protection of the laws.[213]

Judge Botter stated for the court that the New Jersey system of financing schools also discriminated against property owners who were taxed at different rates throughout the state. The court found "no compelling justification for making a taxpayer in one district pay a tax at a higher rate than a taxpayer in another district, so long as the revenue serves the common state educational purpose."[214] The court further condemned leaving the financing of public schools to the mood and aspirations of the taxpayers in the local districts.

Although the court conceded that there were problems when the judiciary grappled with complex school issues, the court did not agree with the defendants' contention that the concept of "local control and responsibility to meet various interests" justified the inequities in fiscal resources among districts.[215] The court concluded that the quality of education in New Jersey had been left largely in local hands and further described local control of education as "illusory" and

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[212] 118 N. J. Super. 223, 287 A. 2d 187 (1972).
[213] Id., 287 A. 2d 289.
[214] Id. at 214-16.
[215] Id. at 190.

"control for the wealthy, not for the poor."[216] School boards in poor districts could not be expected to provide special services for students when they did not have adequate funds even for the essentials. Although the court recognized the desirability of local control, it held that the allocation of school resources according to the chance residence of pupils could not be tolerated under either the state or federal constitutions.[217]

The court discussed input-output factors and noted that poorer districts had less professional staff per pupil, fewer textbooks, and inferior facilities and equipment. These findings caused the court to conclude that there was "some correlation between the quality of teaching and the wealth of the district," and that additional money could improve educational opportunities in the poorer districts.[218]

The New Jersey Supreme Court agreed with the Superior Court that the state scheme for financing public education was invalid, even though the Rodriguez decision had been handed down by the United States Supreme Court in the interim.[219] Judge Weintraub, speaking for the court, contrasted the New Jersey case with Rodriguez and stressed that even in Rodriguez, the Supreme Court did not declare that there never could be a successful equal protection attack in this area.[220] The court also pointed out that Texas contributed 50 percent of the educational costs for public schools from the state, while in New Jersey, 67 percent were raised by local districts.

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[216] Id. at 211.

[217] Id. at 214.

[218] Id. at 205.

[219] 62 N.J. 473, 303 A. 2d 273 (1973).

[220] Id., 303 A. 2d 281. For a discussion of the Rodriguez decision, see text with note 227, infra.

However, in light of the Rodriguez ruling, the New Jersey Supreme Court was hesitant to hold that the state financing scheme violated the equal protection clause of the federal Constitution. Therefore, it relied mainly on the fact that the plan violated the New Jersey constitutional provision which imposed an obligation on the state to support a thorough and efficient system of public schools. The court emphatically stated that this provision required the state to provide "an equal educational opportunity for all children."[221] This ruling, however, left the legislature to determine if schools would be funded from state revenues or if local districts would be required to raise the necessary moneys to satisfy the constitutional mandate. Thus, under this decision, crucial issues such as the criteria for distributing educational resources to guarantee equal opportunities for all students and the method for ensuring equity among taxpayers remained to be addressed in the political arena.

Rodriguez v. San Antonio Independent School District

The mounting tension over the school finance issue finally reached its peak in the Rodriguez case. In this litigation, the federal district court invalidated the method of financing public schools in Texas as violating the equal protection clause of the Federal Constitution.[222]

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[221] Id. at 294. After further argument, the New Jersey Supreme Court determined that it would not disturb the statutory scheme unless the legislature failed to act by December 31, 1974 in a manner compatible with the decision. The court retained jurisdiction over the case to ensure that the new plan would be implemented no later than July 1, 1975, 63 N.J. 196, 306 A. 2d 65 (1973) (per curiam).

[222] 337 F. Supp. 280, (W.D. Tex. 1971).

In holding that more than mere 'rationality' was required to maintain a state classification affecting a 'fundamental interest', the court applied a "very demanding test" since the interest at stake was the individual's opportunity for public education:

> The crucial nature of education for the citizenry lies at the heart of almost twenty years of school desegregation litigation. . . . [B]ecause of the grave significance of education, both to the individual and to our society, the defendants must demonstrate a compelling state interest that is promoted by the current classifications created under the financing scheme.[223]

The district court ordered that a standard of 'fiscal neutrality' be used which required that the quality of public education could not be a function of wealth, other than the wealth of the state as a whole.[224] As in Serrano, the court relied heavily upon Supreme Court decisions which had invalidated discriminatory wealth classifications in cases involving voting and criminal justice. Therefore, the court concluded that the local property tax system unconstitutionally classified the school districts of Texas on the basis of wealth.

The court was implicit in declaring that 'fiscal neutrality' did not require the state to make expenditures in a certain prescribed manner. Thus, the state was left free to choose any desirable financing scheme so long as "the variations in wealth among the governmentally chosen units do not affect spending for the education of any child."[225] The court contended that it was not trying to become a "super legislature," but was encouraging legislative discretion, as long as the plan adopted

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[223] Id. at 283.

[224] Id. at 284.

[225] Id.

did not make the quality of public education a function of wealth other than the wealth of the entire state.[226]

However, the United States Supreme Court did not agree with the lower court's decision. In holding that neither a 'suspect classification' nor a 'fundamental interest' was involved in the case, the Court reasoned that it should not evoke the standard of strict judicial scrutiny in reviewing the legislative action.[227] Although education was noted as one of the most important services performed by the state, it was not recognized as a constitutionally protected right.[228]

Also, the Supreme Court held that the Texas system did not disadvantage an identifiable class of poor persons. Since the Court concluded that a 'suspect class' had not been defined, it declined to apply the strict scrutiny test to a "large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts."[229] The Court further claimed that the plaintiffs failed to show that the lack of personal resources occasioned an "absolute deprivation of the desired benefit."[230]

The Supreme Court was hesitant to interfere with Texas' method of taxation and distribution, because it considered this an area "in which [the Court] has traditionally deferred to state legislatures."[231] The Rodriguez majority recognized that all claims arising under the

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[226] Id. at 285.

[227] Rodriguez, 411 U.S. 1 (1973).

[228] Id. at 29-39. Justice White saw no need for the lengthy discussion of 'fundamental interests' and 'suspect classes', as he found the Texas scheme for financing public schools to be invalid under the traditional 'rational basis' test, id., 66-67 (White, J., dissenting). See note 440, infra.

[229] Id. at 28.

[230] Id. at 23.

[231] Id. at 40.

equal protection clause have implications for the balance of power between the national and state governments, but it stressed that "it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every state."[232] Thus, the Court feared that if it applied the strict scrutiny test to the Texas financing plan it would, in effect, be invalidating the system for financing public schools in most other states.

The Supreme Court also countered the district court's assumption of a correlation between educational expenditures and the quality of education with the argument that there is considerable disagreement in this area among scholars and educational experts.[233] The Court further contended that even if the correlation could be substantiated, the equal protection clause does not require "absolute equality or precisely equal advantages."[234] Since the Court reasoned that no system could be expected to assure equality in education "except in the most relative sense," it concluded that the Minimum Foundation Program in Texas provided at least an 'adequate' education for all children in the state.[235]

The United States Supreme Court, therefore, found that the concededly imperfect system of financing public education in Texas did not violate the equal protection clause, because it assured a basic

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[232] Id. at 44.
[233] Id. at 43. See Chapter II, text accompanying notes 46-48, supra.
[234] Id. at 24.
[235] Id.

education for every child in the state, while at the same time permitted and encouraged significant control of each district's schools at the local level. Justice Powell, delivering the opinion, presented a lengthy exposition on 'local control' in education and applauded the fact that "[i]n an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived."[236] Although the Rodriguez majority did not reject the judgment in Brown, it did conclude that the relationship between the quality of education and the differences in taxable wealth and expenditures among school districts in Texas was not dramatic enough to justify judicial intervention.

However, Justice Marshall took issue with the latter statement in his dissenting opinion. He contended that the "stark differences in the treatment of Texas school districts," due to the differences in taxable property wealth, constituted a direct violation of the equal protection clause.[237] He also refuted the majority's assertion that the Minimum Foundation Program provided an adequate education for all children and thus eliminated the constitutional issue:

> [I]t is inequality--not some notion of gross inadequacy--of educational opportunity that raises a question of denial of equal protection of the laws. I find any other approach to the issue unintelligible and without directing principle.[238]

Justice Marshall concluded that the evidence of wide variations in educational funding was a "sufficient showing to raise a substantial question

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[236] Id. at 49.
[237] Id. at 82 (Marshall, J., dissenting).
[238] Id. at 90.

of discriminatory state action in violation of the Equal Protection Clause."[239]

The issues involved in Rodriguez have been compared with the issues in Baker v. Carr,[240] where the Supreme Court invalidated Tennessee's discriminatory legislative apportionment plan. Early critics of the Baker ruling predicted that the decision would be interpreted as meaning 'one man, one vote', which eventually did become the law of the land. Perhaps, the Rodriguez majority heeded this warning and feared that an affirmative decision would later be interpreted as requiring 'one pupil, one dollar'.[241]

Actually, in Baker v. Carr the Supreme Court did not attempt to prescribe specific remedial measures for malapportionment, but simply exposed the constitutional violation. Katzenback has claimed that the Court in Baker "issued merely a call for action."[242] Bickel also has observed that the Court was not trying to take over the legislative function in apportionment: "The Court . . . opened a colloquy, posing to the political institutions of Tennessee the question of apportionment, not answering it for them."[243]

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[239] Id.

[240] 369 U.S. 186 (1962).

[241] J. Areen & L. Ross, "The Rodriguez Case: Judicial Oversight of School Finance," The Supreme Court Review 33, 38-41, U. Chi. (1973). See also B. Levin, "Alternatives to the Present System of School Finance: Their Problems and Prospects," 61 Geo. L. J. 879 (1973); "Commentary--School Finance," 2 J. L. & Educ. 465 (1973).

[242] N. Katzenback, "Comment: Some Reflections on Baker v. Carr," 15 Vand. L. Rev. 829, 832 (1962).

[243] A. Bickel, The Least Dangerous Branch 195-96 (1962).

Areen and Ross have suggested that there was a third alternative available to the Supreme Court in Rodriguez in addition to 'abstention' or 'dictation'. The Court could have uncovered the possibility of a constitutional violation and remanded the case back to the lower courts for determination of remedial plans. Thus, according to Areen and Ross, the Court should not have specified a single constitutionally mandated formula, but should have held that arbitrary boundary lines of local governments could not be the basis for discrimination among the citizens of a state.[244] If the Supreme Court had found that the use of local property taxes to finance education imposed a disadvantage on students living in low tax base districts, the state legislatures still would have been left wide discretion in devising corrective measures.

However, it also should be recognized that the desegregation litigation has emphasized weaknesses of judicial use of the 'remand'. States have groped for years through endless litigation in attempts to find remedial measures which would satisfy the ambiguous constitutional mandate set forth in Brown v. Board of Education.[245] Perhaps the Supreme Court's experience with its many attempts to reinterpret Brown coupled with the widespread conclusion that it dictated a rigid rule in Baker, offers a partial explanation for the Court's decision to 'abstain' in Rodriguez.

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[244] J. Areen & L. Ross, supra note 241.

[245] 347 U.S. 483 (1954). See discussion accompanying notes 82-171, supra.

The Aftermath of Rodriguez

As stated previously, the Rodriguez majority declined to address the fundamentality of education in cases of its total denial or in situations where it could be proven that state authorities intended to disequalize educational opportunities among the various districts in the state.[246] Nevertheless, this ruling has already influenced some state courts to avoid the federal constitutional issues[247] and to apply lenient standards in evaluating discriminatory state financing plans for public education.[248]

A case in point, Milliken v. Green, involved the validity of Michigan's financing scheme for public schools. In 1972, the Michigan Supreme Court followed the Serrano/Rodriguez rationale in holding that the Michigan plan violated equal protection of the laws under either the 'compelling interest' doctrine or the 'rational basis' test.[249] The court reasoned that state aid did not compensate for the obvious inequities in financial resources among school districts which were caused by the differences in local property tax bases.

In stressing that the issue involved in this case was not "the quality of a child's education as a function of the wealth of the school district in which he resides," the court declined to deal with the broad

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[246]411 U.S. 1, 25, 36-37 (1973). See Chapter III, text with note 148, supra.

[247]See Robinson v. Cahill, 62 N.J. 473, 303 A. 2d 273 (1973); text with note 219, supra.

[248]See Van Dusartz v. Hatfield, 334 F. Supp. 870 (D.C. Minn. 1971); text with note 211, supra.

[249]389 Mich. 1, 203 N.W. 2d 457, 470-71 (1972).

philosophical question of whether equalization of resources would improve education.[250] The insufficient data available concerning a direct relationship between pupil achievement and school district wealth was acknowledged, but the court definitively stated that this finding did not eliminate grounds for an equal protection claim. Therefore, the court focused on the Michigan constitutional mandate to "maintain and support free public education" and concluded that the gross disparities in fiscal resources among districts violated this mandate and thus denied equal protection of the laws.[251]

After the Rodriguez decision, however, the Michigan Supreme Court shifted its approach in evaluating the inequities in the state's educational financing plan. In 1973, the court vacated its prior decision and held that the request of Governor Milliken for certification of questions as to the constitutionality of the state's system for funding public schools had been "improvidently granted."[252]

In contrast to its earlier posture, the court discussed the impact of the disparities in resources among districts and emphasized that there were no claims of specific injuries due to the inequalities of the financing system.[253] The court further highlighted the fact that "[t]he relationship of expenditures to educational opportunity is being sharply questioned."[254] Although the court conceded that the differences in

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[250] Id., 203 N.W. 2d 460.
[251] Id. at 473.
[252] 390 Mich. 389, 212 N.W. 2d 711 (1973).
[253] Id., 212 N.W. 2d 713-15.
[254] Id. at 719.

taxable wealth and expenditures "may contribute to disparities in educational programs offered to students," it reasoned that there was no evidence to demonstrate that the elimination of fiscal inequalities would "significantly improve the quality or quantity of educational services."[255] In direct opposition to its previous decision, the court concluded that the state's obligations were fulfilled by providing "adequate educational services to all children" and that equality in educational opportunities was not required or even feasible:

> Because of the definitional difficulties and differences in educational philosophy and student ability, motivation, background, etc., no system of public schools can provide equality of educational opportunity in all its diverse dimensions.[256]

The Rodriguez decision also had an impact on the ruling handed down by the Arizona Supreme Court concerning the validity of the state's method for funding public education. In Shofstall v. Hollins, the court held that under the Arizona Constitution children had a fundamental right to education but that the differences in school district wealth did not violate equal protection of the laws.[257]

The Arizona court followed the Supreme Court's Rodriguez reasoning in finding no interference with fundamental rights where only relative deprivation was involved and where all children were given the opportunity for a basic education.[258] The court further contended that "[a] school financing system which meets the educational mandates of our constitution, . . . need otherwise be only rational, reasonable and neither discriminatory nor capricious."[259]

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[255] Id.

[256] Id. at 720.

[257] 110 Ariz. 88, 515 P. 2d 590 (1973).

[258] Id., 515 P. 2d 592.

[259] Id.

The Uncertain Future of Litigation Concerning Wealth Discrimination in Education

Litigation attempting to invalidate state plans for financing public education as violating the equal protection clause has met with several obstacles. Carrington has claimed that a fallacy with Serrano and Rodriguez was the attempt to link the fundamentality of education to equality of financial resources.[260] Since research is inconclusive as to the relationship between input factors (e.g., teacher salaries, class size, and educational facilities) and the student's future effectiveness as a citizen, Carrington has concluded that the 'wealth discrimination' approach to establishing education as a 'fundamental interest' was doomed to failure.

Also, if the Supreme Court had upheld the lower court's ruling in Rodriguez, the decision would have eventually affected most other states. Thus, the Court would have faced tremendous problems of supervising compliance with the new constitutional mandate. Members of the Court did not have a firm grasp on what alternative plans were available or what means could be used to evaluate the constitutionality of individual plans devised in the various states. In fact, the Rodriguez majority did not have confidence that an equitable scheme of taxation and distribution

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[260] P. Carrington, "On Egalitarian Overzeal: A Polemic Against the Local School Property Tax Cases," 1972 U. Ill. L. F. 232, 249-50. He also has asserted that education is no more 'fundamental' than other governmental services and that courts should not move into an area "in which public revenue policy is made," id., 249. See text with notes 294-305, infra, for a comparison of education and other governmental functions.

could be devised: "No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact."[261]

Although no specific plan need have been judicially dictated, surely the Court feared that 'one dollar, one pupil' or 'one school district, one tax base' might have become the universal interpretation. Following the Serrano decision, Judge Hawkins, speaking for the New York Supreme Court, made the following comments:

> 'One scholar, one dollar'--a suggested variant of the 'one man, one vote' doctrine . . .--may well become the law of the land. I submit, however, that to do so is the prerogative and within the 'territorial imperative' of the Legislature or, under certain circumstances, of the United States Supreme Court.[262]

If this had, in fact, become the law of the land, the cure might have been as damaging as the illness, because resources required for educational programs vary throughout a state according to specific situations and the types of students involved. Evaluation of the differing needs among school districts, however, would have brought the courts directly back to the 'educational needs' issue which was declared to be non-justiciable due to lack of manageable standards.[263]

Even in view of the Rodriguez ruling, the cases attacking state educational financing plans remain important since they have surfaced another

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[261]411 U.S. 1, 41 (1973).

[262]Spano v. Bd. of Educ. of Lakeland Central School Dist. No. 1, 328 N.Y.S. 2d 229, 235 (1972) (Action alleging unconstitutionality of New York's method for levying and distributing taxes was dismissed).

[263]McInnis v. Shapiro, 293 F. Supp. 327, 335 (N.D. Ill. 1968), aff'd sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969). See text with note 191, supra.

type of discrimination in the public schools in addition to discrimination based on race. They also have exposed some inconsistencies in Supreme Court rulings dealing with wealth discrimination. Justice Marshall pointed out in his Rodriguez dissenting opinion that cases where the Supreme Court has ruled that wealth was not a 'suspect classification' have dealt with instances of de facto discrimination, or discrimination which was not caused by the state. But, in Rodriguez and other litigation dealing with state designed and imposed systems which discriminate against certain citizens on the basis of wealth, the discrimination must be considered de jure in nature.[264] Justice Marshall further elaborated:

> The means for financing public education in Texas are selected and specified by the State. It is the State that has created local school districts, and tied educational funding to the local property tax and thereby to local district wealth.[265]

Thus, the cases attacking public school financing plans, like the desegregation litigation, have emphasized the need for the Supreme Court to establish clear criteria for evaluating the 'state intent' necessary to constitute unlawful governmental discrimination.

Concerning the immediate future, it may be that the strict constructionist Supreme Court will stand by the holding in Rodriguez. Hogan has asserted that the Supreme Court has made it clear that it will not be the forum where the issue concerning inequalities in state educational financing schemes will be settled.[266] Perhaps, for a while

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[264] 411 U.S. 1, 123 (1973) (Marshall, J., dissenting).

[265] Id.

[266] J. Hogan, supra note 133, at 73.

at least, egalitarians will have to proceed through the state courts in their efforts to eliminate the dependency on local district wealth for financing public schools. This observation, however, should not be interpreted to mean that the issue has been 'declared dead'. Long has asserted that it remains likely "that the wealth-free principle rejected by the Supreme Court as a tenet of the Federal Constitution will be required by certain state courts as a matter of state constitutional law."[267]

California and New Jersey have already judicially required reform in public educational financing plans, and litigation is in progress in several other states.[268] Furthermore, at least one state, California, has announced that the individual has a basic, fundamental right to an education.[269] Although some courts are relying on Rodriguez to uphold discriminatory financing plans,[270] if enough state courts rule affirmatively to equalize educational resources within the state, perhaps the next time the United States Supreme Court is confronted with the issue it will be persuaded to intervene in the legislature's 'sacred domain of taxation and distribution' in order to protect the personal interests at stake.

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[267]D. Long, "Litigation Dealing With Urban School Finance Problems: Notes on Future Directions," Clearinghouse Review, September, 1974, at 334.

[268]An Idaho trial court has adopted the reasoning used in Robinson v. Cahill in holding Idaho's school finance system unconstitutional, Thompson v. Engelking, Civil No. 47055 (Idaho Dist. Ct., Ada County, Nov. 16, 1973). This case has been appealed to the Supreme Court of Idaho, D. Long, id., at 336. Cases attacking state school finance plans are also in progress in Oregon (Olson v. Oregon, Civil No. 72-0569, Ore. Cir. Ct., Lane County, 1974) and Washington (Northshore School Dist. No. 417 v. Kinnear, Civil No. 42352, Wash. Sup. Ct., 1974).

[269]Serrano v. Priest, 96 Cal. Rptr. 601 (1971).

[270]See Milliken v. Green, 390 Mich. 389, 212 N.W. 2d 711 (1973), text with note 252, supra; Shofstall v. Hollins, 110 Ariz. 88, 515 P. 2d 590 (1973), text with note 257, supra.

Education and Other Interests Compared and Contrasted

In cases involving educational finance, it is quite possible that the courts have viewed the issues as pertaining to the interests of taxpayers as much as to the rights of the students attending public schools. However, in other litigation, where the injury to children has been direct and less complicated by related themes, the judicial posture has been more affirmative in protecting the students' interests. Some federal courts have greatly reduced the burden on plaintiff school children to prove the injury they incur when excluded from public schools or the damage they suffer from discrimination in public education.

This judicial posture at the same time increases the burden placed on the defendant school boards to justify any discriminatory action. For example, the Chinese children of San Francisco, who sought to have the school district provide remedial programs to compensate for their English language deficiencies, were given no relief in the lower courts, but they found a sympathetic forum in the Supreme Court of the United States. The Supreme Court held that the students had a right to learn basic English skills, since these skills "are at the very core" of what public schools teach.[271] It can be deduced from this ruling that students should expect certain personal interests to be satisfied (i.e., the opportunity to successfully learn) from their public school experience, especially since their attendance is mandated by law.

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[271]Lau v. Nichols, 483 F. 2d 791 (9th Cir. 1973), rev'd 414 U.S. 563 (1974). See Chapter III, text accompanying note 185, supra.

As discussed in Chapter III, the Supreme Court recently ruled in Goss v. Lopez that a student has a 'protected interest' in acquiring a public education.[272] The student has a state-created property right which results in a legitimate claim of entitlement to public schooling that cannot be denied without procedural safeguards. In addition, the individual has a 'protected liberty' to remain free from governmentally imposed stigma, and this right also cannot be impaired by school authorities without due process of law.[273]

Lower court decisions concerning the rights of pregnant and married students to attend school have emphasized the damage to individual interests that accrue when one is denied a public education. In addition, many of the cases involving student suspension and expulsion have stressed that a high school diploma is often a 'pass card' to obtaining a decent job or gaining admittance to college, so any action which curtails the individual's opportunity to remain in school should be carefully evaluated. Whether it is the suspended student's interest in finishing school, the retarded student's interest in attending school, or the minority student's interest in educational opportunities which are offered to other pupils, there is little doubt that the denial of such interests can serve a life long injury on the child. Justice Harlan in 1970 voiced his disdain for the judicial use of such "slogans" as 'suspect classification' or 'compelling state interest' because they "blur analysis by shifting away from the nature of the individual interest affected."[274]

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[272] 43 U.S.L.W. 4181, 4183-4184 (U.S. Jan. 22, 1975). See Chapter III, text accompanying notes 75, 135, supra.

[273] Id., 43 U.S.L.W. 4184. See Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Chapter III, text accompanying notes 138, 165, supra.

[274] Williams v. Illinois, 399 U.S. 260, 261 (1970).

The Relative Value of Education

Buss has referred to education as the foundation of democracy and the "sine qua non for a literate and enlightened electorate."[275] Supreme Court justices have also proclaimed public education to be "the most powerful agency for promoting cohesion among heterogeneous democratic people"[276] and the "most vital civic institution for the preservation of a democratic system of government."[277] Even the controversial Rodriguez decision addressed the fact that at least some minimum education for all children is necessary for them to participate successfully and intelligently in political and community life.[278] However, the problem arises in trying to determine what 'minimum level of adequacy' is required.

The distinction between due process and equal protection guarantees becomes somewhat blurred in areas such as education where it is difficult to define 'minimal sufficiency' so that differences in the state's treatment of individuals can be evaluated. If there are no minimum standards, it is almost impossible to ascertain when the services provided to the individual by the state fall below, or are so inferior to, those offered others as to be insufficient.

Michelman has recognized that in education this problem is particularly acute since education "is valued because of its relevance to a competitive

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[275]W. Buss, "Due Process and School Discipline," 119 U. Penn. L. Rev. 545, 547 (1971).

[276]McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

[277]School Dist. of Abington Township v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

[278]411 U.S. 1, 36-37 (1973).

activity."[279] Thus, he has concluded that "inequality of access" to educational opportunities "will entail the evils of absolute deprivation."[280] According to Michelman, since education is meaningful in relation to having as much as or more than someone else, deprivation exists only where inequality exists, and conversely, "inequality implies deprivation."[281]

Justice Marshall, in his Rodriguez dissenting opinion, addressed this same issue. He noted that since the political process is competitive, "[i]t is . . . of little benefit to individuals from a property poor district to have 'enough' education if those around them have more than 'enough'."[282] It can thus be reasoned that inequalities in educational opportunities cannot be justified simply because a minimum public education is made available for all students. Inequality is denial, where the interest at stake is education.

Education Compared to Criminal Justice

The Supreme Court has declared that the individual's right to fair criminal procedures is 'fundamental', and state action discriminating against indigent criminals has been invalidated by the Court.[283] In contrast, the Supreme Court held in Rodriguez that education is not a 'fundamental interest' and that discrimination in public education based on wealth would not be strictly scrutinized by the Court.[284] However,

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[279] F. Michelman, supra note 12, at 49.

[280] Id.

[281] Id.

[282] 411 U.S. 1, 114 n. 72 (1973) (Marshall, J., dissenting).

[283] See Chapter III, text with note 37, supra.

[284] 411 U.S. 1 (1973).

it can be argued that education affects a class of citizens, children, who on the whole are more deserving than criminal defendants. Coons et al. have claimed: "By definition the class 'children' is incapable of deserving less than the full solicitude of parens patriae; they are innocent even without benefit of presumption."[285]

In the area of criminal justice the individual can be disadvantaged by the denial of fair procedures, but there is no guarantee that the mere assurance of fair procedures will ultimately affect the person's plight.[286] However, discriminatory state action in education disadvantages a much larger class of citizens, and by limiting children's educational opportunities, their chances for future success in life can be greatly reduced.

It is true that discriminatory action concerning the criminal justice process has been fairly inexpensive for the state to remedy, whereas, equalization of educational expenditures and opportunities can be a more costly venture. Still, this distinction should not justify state inaction in eliminating discriminatory educational practices. After all, the state gains more in return from educational opportunities it offers than from its criminal justice procedures. As discussed at length in chapter two, it has been claimed that education in the public interest reduces the crime rate, adds to the economic growth of the nation, and supports other values of a democratic society such as political participation and intelligent communication.

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[285] J. Coons et al., supra note 2, at 365.

[286] Id.

Lucas has criticized the comparison of wealth discrimination in financing public schools with wealth discrimination against indigent criminal defendants. He has claimed that although the Supreme Court has held that defendants must be supplied counsel, the counsel provided does not have to be the highest paid or 'best' lawyer available.[287] This analogy might be valid if it were asserted that all children are entitled to an education equivalent to the 'best education' available in private schools. However, no such claim has been made in any litigation. Plaintiffs have only asked for an education equal to that provided for other children through public funds. It is the discrepancy among educational opportunities in public school districts within a state that is being contested, not the difference between public and private education. The analogy with the criminal defendants would be stronger if it could be shown that a state provided, through public resources, counsel for some indigent criminal defendants and not for others, or that the state differentiated concerning the caliber of the lawyers furnished for such defendants.

Educational Interests and Voting Interests

The citizen's right to participate in the state franchise on an equal basis with others has been acknowledged often by the Supreme Court.[288] In addition, the fact that education is a basic preparation for enlightened participation in the democratic process has been judicially

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[287] J. Lucas, "Serrano and Rodriguez: An Overextension of Equal Protection," 2 NOLPE L. J. 18, 35-36 (1973).

[288] See Chapter III, text accompanying note 32, supra.

recognized.[289] Coons et al. have claimed that in every respect, education seems equal to the rights of voting and association in its importance to a democracy: "It underlies the whole substance of the political process and is antecedent to voting and political organization in the orders of both time and cause."[290] An individual's political behavior reflects his ability to understand public issues and communicate about them intelligibly. Coons et al. have further asserted:

> If society's stake in the preservation of the 'voting interest' really is broader than protecting the mechanical act of pulling a lever--and surely the court perceives it so--education must be viewed as a crucial interest.[291]

A major distinction between the individual's interest in voting and his interest in education is that the former has never been mandated by law while the latter is compulsory in most states. Regardless of how highly a person values his right to vote, he is never ordered to exercise that right. However, in nearly every state, children must attend school for a specified period of time or their parents will suffer criminal penalities. Therefore, it seems that the courts should be at least as protective, if not more so, of the individual's interests in obtaining an education as they are of his interests in voting.

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[289]See West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Thornhill v. Alabama, 310 U.S. 88, 102 (1939) Sweezy v. New Hampshire, 354 U.S. 234, 250 (1956); State of Wisconsin v. Yoder, 406 U.S. 205 (1972).

[290]J. Coons et al., supra note 2, at 371-72.

[291]Id. at 372.

Educational Interests and the Right to Travel

Education is also related to the individual's basic, fundamental right to travel freely. Public education facilitates interstate travel because the national language is transmitted through the schools, students are exposed to their national heritage, various regions of the country are studied, and the total curriculum is national in many respects. Also, teacher training institutions are not usually designed for specific subcultures, and national textbook companies and learning corporations service most areas of the country. There can be no doubt that traditional American values are transmitted through the public schools.[292] In Kent v. Dulles, the Supreme Court described the importance of the right to travel in words which could be used equally well to describe the importance of education:

> [T]ravel within the country may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. . . .[293]

Education and Other Public Services

The individual's interests in education have been compared to his interests in recreational facilities provided by the government. In Palmer v. Thompson, the city of Jackson, Mississippi desired to close public swimming pools when it ascertained that it could not maintain the pools without financial loss if required to operate them on a desegregated

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[292] Id. at 390.

[293] 357 U.S. 116, 126 (1958).

basis.[294] The Supreme Court found that the closing of the pools was not in violation of the fourteenth amendment. In dicta, the Court compared the right to education with the right to recreation and suggested that education may well be a right "retained by the people" under the ninth amendment.[295]

The Supreme Court decision in Palmer can be contrasted with the ruling in Griffin v. County School Board of Prince Edward County, where the Supreme Court held that one county could not close its public schools while other public schools in the state remained open.[296] It appears from a comparison of these two cases that the Supreme Court has given more weight to the individual's interest in education than to his interest in recreational facilities, at least for equal protection review.

Some, who fear the judicial affirmation of education as a 'fundamental interest' for equal protection analysis, feel that other public services such as police and fire protection would also have to be distributed equally if such a requirement were made concerning education. These services have traditionally depended on the standard of living in the various communities within a state and on the aspirations of the residents. Kurland has noted that the equal educational proposal could mean the "elimination of local governmental authority to choose the

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[294] 403 U.S. 217 (1971). Since the Y.M.C.A. leased the pools from the city, the court of appeals concluded that there was no governmental involvement in the resulting discrimination, 419 F. 2d 1222 (5th Cir. 1969).

[295] Id., 403 U.S. 233-34.

[296] 377 U.S. 218 (1964). See text accompanying note 95, supra, for a discussion of this case.

ways in which it will assess, collect, and expend its tax funds."[297] If public educational opportunities were equalized, would health services, sanitation services, transportation, police and fire protection, and a host of other traditionally local functions eventually have to come under a centralized government, so they could be equalized in a similar manner? Kurland, partly facetiously, has contended that the next logical step would be to eliminate inequalities among states, thus disregarding state boundary lines. He has concluded that this obviously would call for a more drastic change in the concept of local governmental power than the Supreme Court has yet contemplated: "State-wide equality is not consistent with local authority; national equality is not consistent with state power."[298]

Even if equality in state public educational opportunities were judicially mandated, it would not have to follow that other governmental services would be drastically affected, because education can be distinguished from other public functions in several respects. First, the state's responsibility for public education is delineated fairly specifically in most state constitutions. For example, the Constitution of Idaho includes:

> The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho to establish and maintain a general, uniform and thorough system of public, free common schools.[299]

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[297] P. Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," 35 U. Chi. L. Rev. 583, 589 (1968).

[298] Id. at 590. Carrington has argued that education should not be considered any more 'fundamental' than other governmental services. See P. Carrington, supra note 260.

[299] Constitution of Idaho, Art. IX, Sec. 2.

In contrast, governmental responsibilities for recreational facilities, sanitation services, and fire protection in local communities within the states are not specified in state constitutions.

Also, centralized state control of education is manifested through state laws and regulations. The state establishes requirements for teacher certification and tenure, approves textbooks, establishes the minimum school term, and determines required courses, in addition to its fiscal responsibilities in approving budgets and contributing to the operational costs of the school districts.[300] Few other governmental functions can approach public education in the degree of control exerted by the state legislature and its administrative agencies.

A major distinguishing factor between education and other governmental services concerns the difference between functions assigned to local political divisions as agents of the state and powers given to local governments for optional exercise in accordance with local interests. Education has been well established as a state responsibility,[301] and the state cannot delegate its legislative function regarding public schools. However, the state can delegate to local school boards the authority to make decisions concerning the operation of schools, as long as these decisions are consistent with state laws and policies. Regarding many other public services, such as sewers, fire protection, and police

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[300] See Milliken v. Bradley, 94 S. Ct. 3112, 3152 (1974) (Marshall, J., dissenting). Many of these arguments, distinguishing education from other governmental functions, were used in the Serrano and Rodriguez school finance cases to assert the fundamentality of education.

[301] See Chapter II, text accompanying notes 12-21, supra.

protection, the local governmental unit has discretionary power to design and operate the services according to local needs. In 1962, the Supreme Court of Michigan emphasized:

> Unlike the delegation of other powers by the legislature to local governments, education is not inherently a part of the local self-government of a municipality. . . . Control of our public school system is a State matter delegated and lodged in the State legislature by the Constitution.[302]

The compulsory nature of education also distinguishes it from most other governmental functions. Citizens are not mandated by law to partake of other state services, with the possible exception of police protection. The criminal process can be viewed in one sense as compulsory, but as Coons et al. have noted, it is not a service that most individuals seek voluntarily.[303] Although the child must attend school for six hours a day, nine months a year for at least ten years of his life, few other governmental functions can claim to have such a lengthy influence on the individual. Buss has asserted that aside from prison confinement or military service, "nothing in American society compares to public schools in establishing state-imposed control over a person's life."[304]

The fact that public education touches the lives of most citizens of the state again attests to its unique position among governmental functions. Many other services are rarely used by some citizens, and few are used on a regular or continuing basis. For example, an individual

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[302]School Dist. of Lansing v. State Bd. of Educ., 367 Mich. 591, 116 N.W. 2d 866, 868 (Sup. Ct. Mich. 1962).

[303]J. Coons et al., supra note 2, at 416.

[304]W. Buss, supra note 275, at 547.

may never need to call upon the fire department, and if he does happen to have the need, the state does not compel him to make use of the services available. Similarly, most governmental functions, other than public education, have a rather 'neutral' effect on the individual. In other words, the relative position of the citizen is not usually altered as a result of the public service. In constrast, the public school has a tremendous influence on the lives of the citizens, and it attempts to 'mold' students in a manner selected by the state.

Other distinguishing factors could be mentioned, such as the greater benefits that accrue to the state from public education than from other public services, but the above examples should suffice in demonstrating that education occupies an important and unique role among governmental functions.[305] Thus, although it may be desirable, it does not follow that all public services would have to be treated in the same manner as education, or that a judicial ruling affecting education would automatically affect other governmental functions. However, it should be pointed out that if the state did assume more of the fiscal responsibility for education, rather than relying on the local property taxes, it could have a very positive effect on other public

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[305]Recently, several circuit courts have ruled that the asserted rights to decent housing or municipal utility services were not constitutionally protected. See United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida, 493 F. 2d 799 (5th Cir. 1974); Jackson v. Metropolitan Edison Co., 483 F. 2d 754 (3rd Cir. 1974); Wilkerson v. City of Coralville, 478 F. 2d 709 (8th Cir. 1973). Although each of the courts noted the importance of the personal interests asserted, they did not find them to be guaranteed by the equal protection clause.

services. Much of the competition for locally collected tax revenues could be eliminated, and more funds would be available for equitable distribution among municipal services.

Education and Other Personal Interests

It need not be debated or reviewed in terms of Maslow's hierarchy[306] that an individual values adequate food and shelter in preference to adequate education. However, this fact should offer no impediment to judicial efforts to protect the individual's right to an education, even if a similar right to decent food and shelter is not guaranteed. A person usually must turn to the private sector of the economy in seeking a job, income, and housing. The possible exception to this is the group of people on public welfare. In contrast, the majority of the citizens in this nation attend public schools during their lifetime, and the resources for satisfying this interest are mainly provided by the government.

Due to the nature of the free enterprise economy in this country, it cannot be expected that equality would be mandated for all the personal interests that the individual desires to have met through the private sector. However, equal protection of the laws can be guaranteed for interests which are fulfilled by the state. Unless there is a dramatic philosophical change in this nation, it would be a difficult task to attempt to totally equalize income levels and standards of living

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[306] See A. Maslow, Motivation and Personality (1954), for a discussion of the hierarchy of personal needs from 'survival' to 'self-actualization'.

throughout a state. Conversely, since public educational opportunities are governmentally controlled, equalization in this realm is certainly conceivable.

Even the interests of the class of citizens on public welfare programs can be distinguished from the interests of the class of citizens attending public schools. Welfare recipients are not compelled to apply for such benefits, whereas school attendance is mandated by law. Also, public assistance programs are initiated in efforts to aid individuals who are unable to provide sufficiently for themselves. In contrast, public school attendance is required by law to ensure the well-being of the state as well as to further the interests of the individual.

One final comment must be made concerning the comparison of education to other personal interests. Even if income levels could be completely standardized within a state, the government surely would not attempt to mandate how each individual chose to spend his income. Some persons might decide to live in modest or even substandard homes, in order to travel or spend money in other ways. It is beyond the imagination that the state would require persons to live in certain houses or to consume specified amounts of food. But in public education, the individual has no choice concerning the school he attends, the teacher he receives, and often the educational offerings available to him. Thus, it must be concluded that it is not only the importance of the personal interest to the individual that should determine whether it receives constitutional protection or not. The main source of fulfillment of the interest, either the private or public sector of the economy, certainly must also be considered. Even more significant is assessment of the

degree of governmental control exerted over the individual's liberty in his attempt to satisfy the interest involved.

Classifying Facts in Education

Forkosch has referred to 'classification' as the "jugular vein" of equal protection,[307] and Hogan has called it the "lifeblood of education."[308] Most educators consider their ability to classify students an essential aspect of their work. Pupils are classified by academic levels, social maturity, athletic ability, sex, age, and many other distinguishing traits. Often scores on standardized achievement tests, I.Q. tests, or teacher-created tests are used to separate students for special treatment, to determine whether students will be admitted to certain programs, and to 'pass' pupils from one grade level to the next. It has been asserted that without classification, the business of public education could not proceed.[309]

The right of educators to classify students is not being questioned in the courts, but procedures used to make such determinations and the bases for classifications are being questioned and in some cases being subjected to strict judicial scrutiny. The courts are looking more closely at classifications which disadvantage groups of students and are placing the burden of proof on school officials to demonstrate the relationship between discriminatory classifications and desired state

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[307] M. Forkosch, Constitutional Law 519 (1969).

[308] J. Hogan, An Analysis of Selected Court Decisions Which Have Applied the Fourteenth Amendment to the Organization, Administration, and Programs of the Public Schools, 1950-1972 (doctoral dissertation, University of California, 1972), at 128.

[309] Id.

purposes. Arbitrary labels for children, which would be disallowed for adults, are now being exposed, and no longer can these unjustified classifications be used in public schools under the guise of "benevolent guidance from wise and more experienced members of the community."[310]

Classifications Based on Race, Lineage, and Illegitimacy

Race, lineage, and illegitimacy are unalterable traits over which the individual has no control. As discussed throughout this chapter, courts have strictly reviewed discriminatory classifications based on these grounds because the individual should neither be blamed nor rewarded for the particular circumstances into which he was born. If Americans truly believe that 'all men are created equal', then there can be no justification for discriminatory treatment based on neutral criteria concerning a person's unalterable traits.[311] In a case involving discrimination against illegitimate children, the Supreme Court recognized that no child is responsible for his birth and further emphasized that the equal protection clause should be used to invalidate discriminatory laws "relating to status of birth."[312]

There is no need to review the litigation involving racial discrimination in public schools as it has been discussed previously at length. Unlike the desegregation cases, where intent to discriminate

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[310] L. Perle & R. S. Browning, "Student Classifications and Equal Protection: Marriage and Sex," 3 J. L. & Educ. 93, 97 (1974).

[311] See "Developments in the Law-Equal Protection," supra note 1, at 1127. Although alienage is a characteristic which can be changed by the individual changing his citizenship, the courts have chosen to apply the same strict standard of review for classifications based on alienage as for racial classifications. See text with note 410, infra.

[312] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175-76 (1972).

against a class of students has often been obvious, rarely have school authorities intended to disadvantage groups of children on the basis of their illegitimacy or lienage. However, many instructional programs designed for the mainstream child have in fact disadvantaged groups of children of foreign nationalities because they have been unable to benefit from the only programs offered.[313] If the courts would proceed to analyze the benefits actually received by the alleged disadvantaged class instead of evaluating the 'intent' of school officials to create discrimination, then much reform in educational programs could be initiated through the courts.

Classifications Based on Academic Achievement or Ability

Courts are beginning to question the current use of achievement test scores for pupil placement purposes. In the widely publicized decision, Hobson v. Hansen, the use of achievement test scores to place students in various ability tracks was attacked as unconstitutional. Judge Wright stated for the federal district court that the track system was used in the schools of Washington, D.C. to divide students into separate, self-contained curricula.[314] The plaintiffs alleged that the children assigned to the lower tracks had very little chance of advancing to higher tracks due to the limited curriculum and the absence of remedial instruction. Plaintiffs also charged that the track system placed "a dear price on teacher misjudgments."[315] Thus,

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[313] See Lau v. Nichols, 414 U.S. 563 (1974). For a discussion of this case, see Chapter III, text with note 185, supra.

[314] 269 F. Supp. 401, 511-14 (1967), aff'd sub nom. Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969).

[315] Id., 269 F. Supp. 492.

they asserted that erroneously placed students had the opportunity to progress only at the speed or level at which they were taught.[316]

In this case, the court particularly addressed itself to the test scores used to assign students to the various tracks. Judge Wright analyzed the accuracy of the test measurements and the misjudgments often resulting from assigning pupils to instructional programs on this basis. Thus, for the first time, a court looked at the testing issue, examined its theory, data, and methods, and found it to be discriminatory in nature. The court concluded that the tests were inaccurate guides to pupil placement and that they discriminated against black children by erroneously placing them disproportionately in lower tracks.[317]

The Court of Appeals agreed with the district court's conclusion that students were not being classified according to their ability to learn, but were being 'tracked' by socioeconomic or racial status. Justice Bazelon noted for the appellate court that when students were reevaluated by trained psychologists, it was determined that two thirds of the 'basic track' pupils had been misclassified.[318] He further emphasized that these lower track students were stigmatized and denied an education comparable to that of other pupils.

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[316]It can be argued that tracking students becomes a self-fulfilling prophecy because students who score poorly on placement tests and are assigned to lower tracks, with less challenging work and often less competent teachers, usually do progress at slower rates than fellow classmates placed in higher tracks. See "Legal Implications of the Use of Standardized Ability Tests in Employment and Education," 68 Colum. L. Rev. 691, 735 (1968).

[317]269 F. Supp. 401, 513 (1967).

[318]Smuck v. Hobson, 408 F. 2d 175, 187 (D.C. Cir. 1969).

In 1969, the Fifth Circuit Court of Appeals was called upon to review the legality of a plan for tracking students used in Jackson, Mississippi. The court invalidated the plan and held that students could not be placed in classes on the basis of achievement scores until a unitary school district had been established to the court's satisfaction.[319] A similar Louisiana case involved ability grouping within the schools in an effort to separate classes according to race. The federal district court held that classification of students on a nondiscriminatory basis would be permissible, but that students could not be assigned to classes on the basis of race.[320]

If schools are truly attempting to meet the unique needs of the various types of students, and not using grouping techniques as a guise for discriminatory practices, then some classification should be necessary in order to enhance the students' educational experience. The burden on the school is not to misclassify students or arbitrarily stigmatize them without procedural safeguards.

This issue becomes especially relevant in cases where students have been assigned to special education classes. If placement is erroneous, this can have an impact on the student's status in the school environment and can result in harmful psychological stigma.[321] In a

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[319] Singleton v. Jackson Municipal Separate School Dist., 419 F. 2d 1211 (5th Cir. 1969).

[320] Moore v. Tangipahoa Parish School Bd., 304 F. Supp. 244 (E.D. La. 1969).

[321] See text with notes 336-48, infra. See also, Moses v. Washington Parish School Bd., 303 F. Supp. 1340 (E.D. La. 1971); Lemon v. Bossier Parish School Bd., 444 F. 2d 1400 (5th Cir. 1971); Chapter III, text with notes 161-70, supra.

California case, it was alleged that I.Q. scores were used to the detriment of Mexican-American children in their placement, instruction, and evaluation in school. This suit was a class action in behalf of Spanish-speaking children who claimed that group administered tests unfairly evaluated their ability.[322] The California Supreme Court agreed that the students should not be placed in classes for the mentally retarded based on the scores from such tests.

Classifications Based on Sex

During the past few years, the judiciary has been called upon to review allegations of sexual discrimination in the public schools. Differential treatment based on sex has been claimed concerning grooming policies, admission policies, and eligibility for athletic competition. In Bray v. Lee, admission practices of the Boston Latin Schools were questioned on the grounds that they discriminated against female applicants. Due to the different seating capacities in the two schools, the boy's Latin School required only a score of 120 or better on the entrance exam for admittance, while the girl's school required a score of 133 or better.[323] The class action suit was filed on behalf of the 177 girls scoring between 120 and 133 on the exam who were denied the opportunity of attending either Latin school. If the students had been seated together in a single class, a score of 127 would have been required for all

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[322]Rutz v. State Bd. of Educ., Civil Action No. 218294 (Sup. Ct. San Francisco County, Cal., filed Dec. 16, 1971), cited in A. Abeson, "A Continuing Summary of Pending and Completed Litigation Regarding the Education of Handicapped Children Number 7," Eric Reports, ED 085 930, November, 1973.

[323]337 F. Supp. 934 (D. Mass. 1972).

applicants. Therefore, the court concluded that the entrance requirements resulted in unconstitutional discrimination on the basis of sex.

School athletic activities also have been the source of litigation alleging sex discrimination in education, and according to Hogan, "the last sanctum of male chauvinism--the locker room--is about to be invaded by the girls."[324] In 1959, the Supreme Court of Indiana denied relief to plaintiffs when sex discrimination was alleged in interscholastic sports. The Court relied on the rationale that the right to attend public schools does not include the right to participate in interscholastic sports.[325] However, this holding was overruled in 1972 in Haas v. South Bend Community School Corporation.[326] In this case, a regulation of the Indiana High School Athletic Association was challenged that prohibited boys and girls from participating in interschool athletic games as mixed teams. A female student, qualifying for the high school golf team, had been denied the opportunity to participate in team competition. The Supreme Court of Indiana found no reasonable justification for denying female students the opportunity to qualify with male students in interscholastic activities not involving physical contact between the participants, and thus held that the regulation violated equal protection mandates.

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[324] J. Hogan, "Sports in the Courts," Phi Delta Kappan, October, 1974, at 132.

[325] Indiana High School Athletic Ass'n v. Lawrence Circuit Court, 162 N.E. 2d 250 (Sup. Ct. Ind. 1959).

[326] 289 N.E. 2d 495 (Sup. Ct. Ind. 1972).

In Bucha v. Illinois High School Association, two female high school students claimed discrimination because they were denied the opportunity to compete in interscholastic swimming competition on an equal basis with male students. The federal district court chose to uphold the classification based on sex due to its conclusion that the classification had a rational relationship to the state purpose.[327] However, in a case involving a similar factual situation, the Eight Circuit Court of Appeals reached an opposite conclusion. In Brenden v. Independent School District 742, the Eighth Circuit Appellate Court upheld the district court's decision that the high school athletic league's rule, banning participation by females on males' teams, was arbitrary, unreasonable, and a violation of the equal protection clause.[328] The district court had pointed out that there were no alternative programs in tennis or cross country running and skiing sponsored by the schools which would provide an equal opportunity for females to compete in these events. Thus, the court concluded that by denying female students the opportunity to participate on teams for males, they were totally excluded from scholastic competition due to their sex.[329]

The district court in Brenden further elaborated on the injury resulting from sex discrimination in the schools:

> There is no longer any doubt that sex-based classifications are subject to scrutiny under the equal protection clause and will be struck down when they provide

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[327] 351 F. Supp. 69 (N.D. Ill. 1972).

[328] 342 F. Supp. 1224 (D. Minn. 1972), aff'd No. 72-1278 (8th Cir., April 18, 1973).

[329] Id., 342 F. Supp. 1224, 1234.

> dissimilar treatment for men and women who are similarly situated with respect to the object of the classification.[330]

However, the court was explicit in limiting its ruling to the specific case and refused to make any broader statements concerning the suspect nature of 'sex' as a basis for classification.

In a parallel case, the Sixth Circuit Court of Appeals struck down sex discrimination in interscholastic competition which involved non-contact sports. In Morris v. Michigan State Board of Education, the court ordered an injunction which allowed two female high school students to compete on the male tennis team, since they met the qualifications for team membership.[331] The court concluded that to deny the qualified female students the opportunity to participate on the team would be in violation of the equal protection clause.

The courts have not been the only forum for recent action concerning sex discrimination in the schools. The controversial law banning discrimination on the basis of sex, Title IX of the Education Amendments of 1972, has evoked a volume of protests from threatened organized groups. The major objections against the law have focused on provisions "covering athletics, textbooks, equal employment, scholarships, physical education classes and private organizations including fraternities and scouting groups."[332] The Department of Health, Education, and Welfare (HEW) is supporting an amendment to the law which would exempt certain organizations from the regulations. Due to the overwhelming public

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[330] Id.

[331] 472 F. 2d 1207 (6th Cir. 1973).

[332] The Louisville Times, November 14, 1974, at A, 8.

reaction and the complexity of the issues raised, the final HEW guidelines probably will not be ready for implementation until the Fall of 1975.[333]

Many male students have been involved in litigation challenging school grooming regulations, especially those dealing with the length and style of hair. It could be argued that such regulations discriminate on the basis of sex, since no similar requirements are usually established concerning the length of female students' hair. Although the court decisions have divided fairly evenly between upholding the reasonableness of the school regulation and upholding the constitutional right of the student to govern his own personal appearance, none of the courts have decided the issue on an equal protection claim of sex discrimination.[334] By repeatedly refusing to review such cases, the United States Supreme Court has declined to enter the 'haircut thicket'.[335]

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[333] Id.

[334] An Iowa haircut case did involve a female student who allegedly violated the school rule that hair must be kept one finger width above the eyebrows, clear across the forehead. The district court noted that to its knowledge this was the first case involving a girl's hair length. After considerable review of the factual situation and other judicial rulings concerning grooming policies, the court held in favor of the student's constitutional right to govern her appearance. The court did comment that "the field of female coiffure is one of shifting sand trodden only by the most resolute of men." Therefore, the court undertook "this journey with some trepidation." Sims v. Colfax Community School Dist., 307 F. Supp. 485, 486 (D.C. Iowa 1970).

[335] For a discussion of constitutional issues involved in litigation concerning grooming policies, see "Constitutional Law--Schools and School Districts--Prohibition of Long Hair Absent Showing of Actual Disruption Violates High School Student's Constitutional Rights," 84 Harv. L. Rev. 1702-17 (1971); J. Hogan, supra note 308, at 218-245.

Classifications Based on Handicaps

It can be contended that handicapped children contain the elements of a 'suspect class' and that categorization of such children for special treatment by the state should receive strict judicial review. Children who are totally excluded from public schools because of their handicaps certainly do represent a vulnerable minority group which is disadvantaged by the state when public schooling is made available to 'normal' students.

In addition to the group of students excluded from public schooling, Dimond has claimed that children classified as slow, dumb, or uneducable are stigmatized and often placed in special classes without minimum procedural safeguards to ensure that the placement is accurate.[336] Classification may be proper for such children to facilitate meeting their unique needs, but the procedures should guarantee that the diagnosis is accurate and that the child's status is reevaluated regularly.

Although no firm precedent has yet been established by the Supreme Court or a federal circuit court of appeals concerning the rights of handicapped children to a public education, several lower courts have ruled that these children constitute a 'suspect class' and have been discriminated against by school authorities in violation of the equal protection clause. In addition to the Pennsylvania and Washington, D. C. cases discussed at length previously,[337] litigation concerning handicapped

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[336] P. Dimond, "The Constitutional Right to an Education: The Quiet Revolution," 24 Hast. L. J. 1087, 1099-1101 (1973).

[337] See Chapter III, text accompanying notes 150-158, supra.

children is presently in progress in many states. In California, Massachusetts, and Louisiana, charges have been made that students have been erroneously diagnosed and placed in classes for the mentally retarded. Some children who had been labeled as 'retarded' were found to be of normal intelligence upon retesting with valid instruments. In all three cases, the courts determined that the plaintiffs' constitutional rights had been violated and thus instructed school authorities to submit plans for eliminating the discriminatory practices.[338]

In a Milwaukee case, plaintiffs challenged the state's use of waiting lists for admitting students to special education classes. The handicapped children were denied educational opportunities while waiting to be placed, so the court concluded that the lengthy placement procedure violated equal protection of the laws.[339] In a similar North Carolina case, plaintiffs alleged that the state denied free public education for all of the state's estimated 75,000 mentally retarded students. Since local superintendents had the option of deciding whether

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[338]Larry P. v. Riles, 343 F. Supp. 1310 (N.D. Cal. 1972); Stewart v. Phillips, Civil Action No. 70-1199-F (D. Mass. 1970) (motion to dismiss denied and submission of plan required by February, 1971), cited in A. Abeson, supra note 322; Lebanks v. Spears, Civil Action No. 71-2897 (E.D. La. 1973), cited in A. Abeson, id. For a discussion of these cases and similar litigation, see P. Friedman, "Mental Retardation and the Law: A Report on the Status of Current Court Cases," Eric Reports, ED 084 756, April, 1973.

[339]Marlega v. Bd. of School Directors, Milwaukee, Wisconsin, Civil Action No. 70-C-8 (E.D. Wis. 1970). For a discussion of this case, see A. Abeson, supra note 322; R. White, "Right To Education--Civil Action No. 71-42," Eric Reports, ED 082 394, December, 1972.

children could or could not substantially profit from the instruction provided in the public schools, the court ruled that the children had a proper equal protection claim.[340]

In Maryland litigation plaintiffs charged that the state provision, requiring unequal amounts of tuition payments depending on the nature of the child's handicap, was unconstitutional since it often made the education of the child dependent on the financial resources of his parents. At a pre-trial conference in August, 1973, the defendants agreed to provide educational opportunities for a number of the plaintiff children. Thus, the federal court has abstained from the constitutional right-to-education issues until the questions regarding state laws have been settled.[341]

A class action suit was initiated in federal court in New York to prevent the New York Board of Education from denying brain injured children adequate and equal educational opportunities. Plaintiffs claimed that delays in screening and placing these children unconstitutionally prevented them from receiving any education. Plaintiffs further declared that the screening process often took as much as two years, and after diagnosis, an additional waiting period preceded placement. If placed in regular classes during this waiting period, the children allegedly received little more than custodial care. The district court reasoned that there was no federal issue since the case

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[340]North Carolina Ass'n for Retarded Children v. North Carolina, Civil Action No. 3050 (E.D. N.C. 1972). See A. Abeson, id.; R. White, id.

[341]Maryland Ass'n for Retarded Children v. Maryland, Civil Action No. 72-733-M (D.C. Md. 1972). See A. Abeson, id.

involved no claim of deliberate state discrimination. Thus, it ruled that the state court was the proper channel for seeking the remedy requested.[342] However, the Second Circuit Court of Appeals held that the district court should retain jurisdiction concerning the federal constitutional claims until the New York state officials had determined the questions of state law.

A three-judge court in Colorado ruled in 1973 to refuse a motion to dismiss a case concerning alleged denial of educational opportunities to handicapped children in violation of the equal protection clause. The court distinguished the case from Rodriguez on the basis that there was the possibility of the existence of a 'suspect class'.[343] Thus, the court held that an inquiry was necessary in order to determine the suspect nature of the classification used in connection with handicapped children.

Recent equal protection claims also have been initiated on behalf of classes of children with behavior disorders. Children with emotional or behavioral problems as well as children with physical handicaps are

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[342]Reid v. Bd. of Educ. of the City of New York, 453 F. 2d 238 (2d Cir. 1971), Reid v. Bd. of Educ. of the City of New York (pending Administrative Procedure Before the State Commissioner of Educ., argued January 16, 1973), cited in A. Abeson, supra note 322. Concerning this case, the New York Commissioner of Education, Ewald Nyquist, required an investigation of the school district which substantiated most of the plaintiffs' claims. To rectify the inadequacies, the Commissioner ordered, among other things, that all students diagnosed as handicapped must "be placed immediately in appropriate public school classes, or if public school classes are not available, in private schools under contract with the state," cited in A. Abeson, id., at 6.

[343]Colorado Ass'n for Retarded Children v. Colorado, Civil Action No. C-4620 (D. Colo. 1972). See M.McClung, supra note 60, at 522.

often categorized under the same general labels and assigned to special education classes or denied educational opportunities altogether.[344] A recent Iowa case in federal court challenged the constitutionality of a state statute which authorized the exclusion from school of children considered "incorrigible, abnormal, immoral, or otherwise detrimental to the best interests of the school."[345] The class action suit was filed on behalf of all Iowa residents eligible for public school who had been excluded or denied equal educational opportunities due to their classification as 'behavior problems', 'disruptive', 'immature', or other such terms denoting nonconforming behavior.[346] Plaintiffs claimed that they were being denied educational opportunities offered to 'normal children' in violation of the equal protection clause. Since an amended complaint was filed in July, 1974, the federal court has not yet ruled on the constitutional issues.[347]

This case emphasizes the injury that can accrue to children by the indiscriminate use of unjustified classifications. When teachers or other school authorities are given the freedom to exclude children from school or to relegate them to special classes because they exhibit 'deviant behavior' or 'social maladjustment', grave injustices to the

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[344]For a discussion of litigation concerning handicapped children in Florida, Kentucky, Utah, Michigan, Rhode Island, Nevada, and other states see A. Abeson, supra note 322; P. Friedman, supra note 338.

[345]Fox v. Benton, Civil Action No. 74-5-D (S.D. Iowa 1974). See M. McClung, supra note 60, at 511, for a discussion of this case.

[346]M. McClung, id.

[347]Id.

children can result if they are erroneously diagnosed. Perhaps a personality conflict between the teacher and pupil or a child's innocent act, interpreted as deviant behavior, might be the basis for determining the type of educational opportunities the child will receive or possibly even result in his exclusion from school. Such practices place a great weight on the accuracy or inaccuracy of the judgments of educators. Even if it is conceded that the child has been correctly diagnosed as having a definite emotional or social problem, there is no basis for denying him educational opportunities which could provide the help he needs in order to overcome his handicap. Classifications based on social or emotional handicaps should receive the same judicial protection that is being afforded to classifications based on physical handicaps in evaluating the validity of discriminatory school practices affecting these 'special' children.

A direct analogy can be drawn between classifications based on an individual's physical or mental handicaps and classifications based on alienage, illegitimacy, or race. All of these categories stigmatize certain persons when discriminatory state action results from the classification. Also, all of these classifying facts concern the individual's status at birth or his inherent characteristics over which he has no control. Neutral factors should not be the basis for either rewarding or penalizing a person. Also, the individual should not be made to suffer when there has been no demonstration of personal guilt.[348]

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[348]See St. Ann v. Palisi, 495 F. 2d 423 (5th Cir. 1974), where the Fifth Circuit Court of Appeals held that children could not be punished by school authorities for the acts of their parents. For a discussion of this case, see Chapter III, text with note 124, supra.

Classifications Based on Poverty

Although the litigation concerning wealth discrimination in education has been discussed at length, a few additional comments are necessary concerning state action which disadvantages students on the basis of wealth. Van Geel has contended that all children constitute an impoverished, politically powerless class.[349] Likewise, Coons et al. have claimed that "realistically all children are poor," so state action affecting children as a class should be reviewed carefully by the courts.[350]

When children are discriminated against because of the wealth of their parents or the wealth of the school district wherein they reside, they are being penalized by their status, an unalterable condition, which they do not have the power to change. Although their parents possibly have some degree of control over the situation, the children themselves should not be held responsible for their families' financial conditions. In this respect, discrimination against children on the basis of wealth can be compared to discrimination against individuals on the basis of race, lineage, or illegitimacy. None of these classifications relate to any wrongdoing on the part of the individual, so disadvantages should not accrue to the person as a result of such traits.

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[349] T. van Geel, "Does the Constitution Establish a Right to an Education?" School Review, February, 1974, at 300-01. See also J. Coons et al., supra note 2, at 374, 425.

[350] J. Coons, W. Clune, & S. Sugarman, "A First Appraisal of Serrano," in G. Maltby, "Restructuring School Finance," Eric Reports, ED 074 606, April, 1972, at 115.

In Johnson v. New York State Education Department, the Second Circuit Court of Appeals upheld legislation which discriminated against the class of children from poor families.[351] In this case a state statute was challenged which allowed local school districts to decide by election whether to charge elementary school students for the use of textbooks. Under this law, children of families who could not afford to pay the $7.50 rental fee went to school without books in the town of Hempstead, New York.[352] The court of appeals recognized that those who could afford textbooks would receive a better education than those who could not, but it reasoned that this was "because they had the financial means to supplement that which the State provides and not because the State has provided them with more than has been provided plaintiffs."[253] The court, therefore, concluded that all students were being treated equally by the state, even though the state action resulted in a definite injury to students from poor families.

The United States Supreme Court agreed to review this case, but before it had the opportunity to rule on the constitutional issue, the qualified voters in the district under litigation voted to assess a tax to purchase all textbooks in grades one through six. Thus, in a per curiam decision, the Supreme Court vacated the court of appeals judgment and remanded the case to the district court to determine if the issue had become moot.[354] Although Justice Marshall concurred in the

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[351] 449 F. 2d 871 (2d Cir. 1971).

[352] See T. van Geel, supra note 349, at 293.

[353] 449 F. 2d 871, 880 (2d Cir. 1971).

[354] 409 U.S. 75 (1972) (per curiam).

Supreme Court's treatment of the case, he emphasized the gravity of discrimination concerning access to textbooks in public schools.[355] He further remarked that the mere fact that the school district had voluntarily ceased its allegedly illegal conduct should not automatically moot the case. He claimed that if courts always followed this procedure, many constitutional issues would never be addressed and defendants would be free to continue action which might be unlawful.[356]

Although the Rodriguez decision will certainly be used to counter claims of discrimination in education under the equal protection clause,[357] Dimond has asserted that to draw the conclusion that the impact of a classification in education is never a constitutional violation is to allow "the semantics and form of Rodriguez to govern the substance of constitutional adjudication hereafter."[358] Courts are continuing to scrutinize classifying facts used in education in efforts to protect the personal interests involved. Classifications based on marriage, sex, pregnancy, handicaps, wealth, and other traits are being reviewed closely by many courts, whereas traditionally most

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[355] Id. at 78 (Marshall, J., concurring).

[356] Id.

[357] See Associated Students v. National College Athletic Ass'n, 493 F. 2d 1251 (5th Cir. 1974); New Rider v. Bd. of Educ. of Indep. School Dist. No. 1, Pawnee County, Oklahoma, 480 F. 2d 693 (10th Cir. 1973). In both of these cases, the appellate courts cited the Rodriguez conclusion that education is not a fundamental interest in upholding school regulations contested on equal protection grounds.

[358] P. Dimond, supra note 336, at 1103.

classifications in education were upheld except for those based on race.[359] A classification that results in direct disadvantages to a group of students can be the basis for invalidating state action under the equal protection clause, even if the court does not address the fundamentality of the interest at stake. As Justice Marshall has aptly observed, equal protection analysis does not have to be affected by the a priori definition of a "right, fundamental, or otherwise."[360]

The Emerging Equal Protection Standard

Due to dissatisfaction with the Supreme Court's adherence to the two-tiered equal protection test discussed previously, equal protection review seems to be taking a new direction under the Burger Court. Justice Marshall, dissenting in Rodriguez, voiced disdain over the Court's rigid classification of equal protection cases into "two neat categories which dictate the appropriate standard of review--strict scrutiny or mere rationality."[361] He argued that the Court's decisions "defy such easy categorization," and that actually the Court has applied a "spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause."[362] Justice Marshall stated in another

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[359]See Baltic Indep. School Dist. v. South Dakota High School Activity Ass'n, 362 F. Supp. 780 (D. S.D. 1973), where the district court invalidated state classification of schools for interscholastic debating competition which discriminated against students from certain schools in reaching national competition.

[360]Dandridge v. Williams, 397 U.S. 471, 520 (Marshall, J., dissenting).

[361]411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

[362]Id. at 98-99.

dissenting opinion that the reasoned approach to equal protection analysis places emphasis "upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[363]

The emerging standard could be categorized as a more stringent 'rational basis' doctrine. Although this standard is often referred to as the traditional 'rational basis' review, it seems to fall somewhere between the two-tiered test formerly evoked by the Court. The Supreme Court seems less willing to accept rationales for state action on mere faith and is evaluating more carefully the relationship between the means chosen to carry out a state purpose and the legislative goal. Although this standard of review does not foreclose the possibility that the legislation will be upheld, as has usually been the case when 'strict scrutiny' analysis has been evoked, it does call for a closer examination of state action than has been required by the traditional 'rational basis' test. Nowak has referred to the emerging standard as the "demonstrable basis standard," and has asserted that the new approach, "selectively employed" by the Court, examines closely the 'means' and 'ends' of legislation.[364] Thus, according to Nowak,

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[363]Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

[364]J. Nowak, supra note 56, at 1071-73.

the state must be able to demonstrate the relationship between discriminatory classifications and necessary governmental goals, even though neither a 'fundamental right' nor a 'suspect class' is involved.

Although the Supreme Court seems to be moving away from 'strict scrutiny' review and avoiding encroachment on the legislative domain by narrowly defining 'fundamental interests', it has used the emerging equal protection standard to strike down state legislation based on discriminatory classifications. Gunther has observed that several recent decisions by the Burger Court have "found bite in the equal protection clause after explicitly voicing the traditionally toothless minimal scrutiny standard."[365]

Narrow Definition of 'Fundamental Interests'

In the past few terms, the Supreme Court has avoided 'strict scrutiny' analysis by limiting the category of 'fundamental interests' to those interpreted as being "firmly rooted in the text of the Constitution."[366] In Dandridge v. Williams, the Supreme Court did not consider the plaintiffs' interest in the receipt of welfare payments to be 'fundamental'.[367] This case involved the constitutionality of a Maryland regulation which placed a ceiling upon the monthly benefits a single family could receive under the Aid to Families with Dependent Children (AFDC) program. Justice Stewart, delivering the majority

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[365]G. Gunther, "The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1, 18-19 (1972).

[366]See Rodriguez, 411 U.S. 1, 102 (Marshall, J., dissenting).

[367]397 U.S. 471 (1970).

opinion, conceded that the "administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings."[368] However, since the legislation fell within the area of economic and social welfare, the majority found no justification for applying a constitutional standard other than the 'rational basis' test.[369] Thus, the Court did not consider food, clothing, and shelter to be 'fundamental interests' for purposes of equal protection review.[370]

Similarly, in Jefferson v. Hackney, the Supreme Court upheld the manner in which Texas distributed welfare payments within the state, even though the method discriminated against one group of recipients.[371] Three of the four Texas welfare programs received needed financial support from state funds; however, the fourth program (AFDC) received only 75 percent of the needed funds from the state. Thus, plaintiffs alleged that they were being denied equal protection of the laws. The plaintiffs also claimed racial discrimination since the AFDC recipients were composed of a higher percentage of Negroes and Mexican-Americans than any other welfare group. Justice Rehnquist wrote for the majority that the legislature justly has the discretion to solve benefit problems one at a time or to establish priorities, as long as its judgments are rational.[372] Thus, the Court applied the 'rational basis' test and noted as part of its reasoning that AFDC recipients were in a better

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[368] Id. at 485.

[369] Id.

[370] See id. at 522-23 (Marshall, J., dissenting). See also text with note 306, supra, for a comparison of these interests and education.

[371] 406 U.S. 535 (1972).

[372] Id. at 546.

position than others on welfare to improve their conditions.[373] Justice Marshall dissented in this case and claimed that the AFDC program was funded at lower levels simply because it was a politically unpopular program within the state.[374]

In Lindsey v. Normet, the Supreme Court emphasized that the crucial criteria for subjecting state legislation to strict scrutiny is not its degree of social importance. In this case, plaintiffs alleged that procedural limitations imposed on tenants in suits brought by landlords under Oregon's Forcible Entry and Wrongful Detainer Law discriminated against the poor by affecting fundamental interests such as the "need for decent shelter" and the "right to retain peaceful possession of one's home."[375] Justice White, speaking for the majority, recognized the importance of decent housing, but he emphasized that "the Constitution does not provide judicial remedies for every social and economic ill." He further stated: "Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions."[376]

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[373]The majority opinion in other recent Supreme Court decisions has shown reverence for the 'bootstrap principle'. See Rodriguez, 411 U.S. 1, 49 (1973).

[374]406 U.S. 535, 575 (1972) (Marshall, J., dissenting). See Richardson v. Belcher, 404 U.S. 78 (1971), where the Court upheld the validity of a provision in the Social Security Act which reduced a disabled person's benefits by the amount of state workmen's compensation he had received. Justice Stewart wrote for the majority that the legislation would be upheld so long as there was any conceivable rational relationship between the distinctions created and a legitimate state purpose, id. at 81-82.

[375]405 U.S. 56, 73 (1972).

[376]Id. at 74.

In Rodriguez, as discussed previously, the constitutionality of Texas' financing plan for public education was attacked on the grounds that it discriminated against children living in property poor districts.[377] In finding neither a fundamental interest nor a suspect classification involved in this case, Justice Powell elaborated on the criteria to be used in declaring an interest to be 'fundamental'. He claimed that the key to discovering whether education is fundamental is not to be found by comparing the relative societal significance of education to subsistence or housing or by deciding whether education is as important as the right to travel.[378] Rather, according to Justice Powell, "the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[379]

In the above cases, since the Supreme Court did not conclude that fundamental interests had been abridged, the Court refused to employ strict judicial scrutiny. It further declined to evaluate whether there were other methods of achieving the state's interests which would have resulted in less discrimination against groups of citizens.[380]

Discriminatory Classifications Under the Evolving Standard

In Dandridge, Normet, and Rodriguez, the Supreme Court majority presented lengthy rationales to justify why the state legislation

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[377]411 U.S. 1, 6-10 (1973). [378]Id. at 33.

[379]Id. at 33-34.

[380]In some cases where the Court has determined that state action impaired a fundamental right, the Supreme Court has ordered that 'least restrictive alternatives' be found to satisfy the state's purpose. See Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

involved did not require 'strict scrutiny' analysis. Thus, in these cases, the Court seemed to retreat to the traditional 'rational basis' test as the only alternative available for evaluating state action under equal protection claims. In contrast to this line of reasoning, in other recent litigation, the Supreme Court has struck down state statutes on equal protection grounds and has obviously evaluated the state action more closely than the traditional standard would require.

It appears that the nature of the classification in several cases has caused the Court to carefully analyze the legality of legislation, even though the Court has not referred to 'suspect classifications' or 'fundamental interests'. The Court has been especially protective of individuals affected by classifications based on unalterable human characteristics, such as sex and illegitimacy, in contrast to classifications relating to human actions. Nowak has contended that distinctions based on a person's status at birth are 'neutral' and that the state's use of such classifying facts for discriminatory purposes "will be invalid if the state cannot demonstrate a factual relationship between a state interest capable of sustaining analysis and the means chosen to advance that interest."[381]

In Reed v. Reed, the unanimous Supreme Court invalidated an Idaho probate provision which gave men preference over women of the same entitlement for appointment to administrator of a decedent's estate.[382]

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[381] J. Nowak, supra note 56, at 1082.

[382] 404 U.S. 71 (1971). Although this decision has been used in subsequent litigation to contend that sex is an inherently 'suspect classification', the Supreme Court in Reed invalidated the state legislation without specifically elevating 'sex' to the category of 'suspect classes', id., 76-77. See Frontiero v. Richardson, 411 U.S. 677 (1973).

Although the Court again claimed that it was using the 'rational basis' test, it did not accept as valid the asserted state purpose of reducing the work of probate courts in choosing between competing applicants.[383] The Court, therefore, was not willing to uphold an unsubstantiated basis for classification as justification for sex discrimination:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. . . .[384]

The Supreme Court also struck down discrimination on the basis of sex in Frontiero v. Richardson.[385] This case involved federal statutes which discriminated against women in the uniformed services concerning receipt of dependent benefits. Although eight members of the Court found the classification in violation of equal protection guarantees, only four justices found sex to be a 'suspect classification'.[386] Four other members of the Court found the statute unconstitutional without applying the 'strict scrutiny' standard. Even though the justices could not agree as to the suspect nature of 'sex' as a classifying fact, it was evident that the Court reviewed the legislation with greater judicial scrutiny than would have been necessary under the traditional equal protection test. Justice Rehnquist, the only dissenting justice, claimed that the statute's assumption that wives of servicemen are usually more dependent upon their spouses than are husbands of servicemen,

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[383] 404 U.S. 71, 76 (1971).

[384] Id.

[385] 411 U.S. 677 (1973).

[386] Id. at 682 (Brennan, J., Opinion of Court, joined by Justices Douglas, White, & Marshall).

was sufficiently valid to meet the minimum rationality test.[387] However, the majority disagreed and held that the relationship between the classification and the legitimate state purpose could not justify discrimination based on sex.

Likewise, the Supreme Court has found discriminatory practices against the class of illegitimate citizens to be constitutionally repugnant. In Weber v. Aetna Casualty and Surety Company, the Court invalidated discrimination against illegitimate children as "contrary to the basic concept of our system that the legal burdens should bear some relationship to individual responsibility or wrongdoing."[388] This case involved a portion of a state's workmen's compensation statute that denied unacknowledged illegitimate children of the deceased equal benefits to those of legitimate children of the deceased. Although the Court recognized the state purpose of encouraging legitimate family relationships, it ruled that the child could not be held responsible for his birth and therefore should not be penalized because of it.[389] The Court explicitly stated that "the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth."[390]

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[387] Id. at 691 (Rehnquist, J., dissenting). The district court had concluded that the statute in question met the 'rational basis' test. See Frontiero v. Laird, 341 F. Supp. 201 (N.D. Ala. 1972).

[388] 406 U.S. 164, 175 (1972).

[389] Id.

[390] Id. at 176. See Levy v. Louisiana, 391 U.S. 68 (1968), where the Supreme Court held that a state could not deny illegitimate children the opportunity to prosecute a wrongful dealth action on behalf of their mother.

In Gomez v. Perez, the Supreme Court held that Texas could not deny illegitimate children the right to financial support from their natural fathers when this right was given to legitimate children.[391] Also, in a New Jersey case, the Supreme Court invalidated a program which provided welfare benefits to low income family units consisting of a married couple and either natural or adopted children. The Court concluded that the state could not withhold benefits from a family on the sole justification that illegitimate children were members of the household.[392]

The Supreme Court struck down legislation in Illinois which resulted in discrimination against fathers of illegitimate children. In this case, Stanley v. Illinois, a statute was attacked which granted a hearing to married parents and mothers of illegitimate children, but denied such a hearing to fathers of illegitimate children prior to adoption of the children.[393] Although this statute violated due process guarantees as well,[394] it denied equal protection of the laws because the fathers of illegitimate children were singled out for discriminatory treatment. The Court declined to identify the reasons for its approach in this decision, but Nowak has remarked that the Court chose a middle ground

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[391]409 U.S. 535 (1973) (per curiam). Although the Supreme Court is invalidating discriminatory state action involving classifications based on human characteristics over which the individual has no control, it is not striking down such classifications used for nondiscriminatory purposes. See Lavine v. Vincent, 401 U.S. 532, 536-540 (1972), where the Supreme Court upheld a system of intestate distribution which favored legitimate over illegitimate children.

[392]New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973).

[393]405 U.S. 645 (1972).

[394]See Chapter III, text with note 194, supra, for a discussion of this case and due process mandates.

between the 'rational basis' test and the 'compelling interest' doctrine due to the neutrality of a person's marital status as a classifying fact.[395]

Although an individual's marital condition is not an unalterable trait, such as sex or illegitimacy, the Court has required more than a rational basis for discriminatory state classifications relating to an individual's marital state. In Eisenstadt v. Baird, a statute was invalidated which forbade the distribution of contraceptives to unmarried persons for the purpose of preventing pregnancy.[396] Justice Brennan, writing for the majority, stated that the case required only the application of the 'rational basis' standard in order to void the state legislation. However, it was obvious that the Court used a stricter standard as there was the conceivable state purpose of preventing pre-marital sex. Yet, this purpose espoused by Massachusetts was not deemed strong enough to justify discrimination against the class of unmarried persons. In addition, the statute could not be shown to be a health measure, as it was cast only in terms of morality.[397] Even though the personal interest at stake was recognized as close to the right of privacy, the Court did not choose to declare that a 'fundamental interest' was involved, and instead scrutinized the "factual connection between the state's classification, the asserted state interests, the means chosen to achieve those interests, and the end result."[398]

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[395] J. Nowak, supra note 56, at 1103.

[396] 405 U.S. 438 (1972).

[397] Id. at 452.

[398] Id. at 451. In dicta, the Court did mention that perhaps the 'compelling interest' doctrine was applicable due to the nature of the interest involved in this case.

In contrast to the Court's reasoning in Dandridge v. Williams and Jefferson v. Hackney,[399] the majority in United States Department of Agriculture v. Moreno overturned a federal law which denied food stamps to any household containing an individual unrelated to any other member of the household.[400] Again, the Court ruled that the governmental purpose could not justify the discriminatory classification even though the holding was not couched in terms of the 'compelling interest' doctrine.[401]

The Supreme Court has also used equal protection review to strike down state classifications which have discriminated against mentally ill persons. In Jackson v. Indiana[402] and Humphrey v. Cady,[403] plaintiffs contested the fact that mentally ill persons committed under criminal statutes were treated differently than mentally ill persons committed under civil statutes. The state could not demonstrate a rational basis for the differential treatment in either of the cases. Although the Court approved of a state's desire to care for incompetent persons and protect the general society from criminal acts, it did not conclude that a uniform treatment procedure for mentally ill persons committed for care would hamper the state's interests.

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[399] See text with notes 367-74, supra.

[400] 413 U.S. 528 (1973).

[401] Id. at 535-38. Note the factual similarity in this case and United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973), handed down on the same day by the Supreme Court. However, in Murry, the Court used due process guarantees to invalidate the state action. See Chapter III, text with note 198, supra.

[402] 406 U.S. 715 (1972).

[403] 405 U.S. 504 (1972).

In several recent cases dealing with personal interests that had been declared 'fundamental' in prior Supreme Court decisions, the Court has invalidated the discriminatory legislation but has avoided delivering its opinion in 'strict scrutiny' language. For example, in 1972, the Court overturned a statute which allowed the state to recover legal defense fees from indigent convicts.[404] The Court found that indigent criminal debtors were discriminated against and that the statute did not pass the 'rational basis' test.[405] The Court, however, actually scrutinized the statute to a greater degree than the traditional test would have required. Acknowledging the valid state interests in recovering expenses and discouraging fraud, Justice Powell spoke for the Court that these interests were not sufficient to "blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect."[406]

Similarly, in Mayer v. City of Chicago, a state law was challenged which deprived an indigent of a free transcript if the sentence did not involve incarceration.[407] Again, the statute was declared unconstitutional because the state's interest in efficiency and economy could not withstand judicial analysis, even though the Court did not mention a 'fundamental interest' or 'suspect classification' in its decision. Likewise, the Supreme Court invalidated a state's filing fee system

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[404]James v. Strange, 407 U.S. 128 (1972).
[405]Id. at 140.
[406]Id. at 141-42.
[407]404 U.S. 189 (1971).

for primary elections, because the state could not demonstrate that the filing system was a rational means of advancing a state purpose.[408] Although the Court accepted the legitimate state interest in creating an economical system, the state failed to demonstrate that "patently exclusionary" fees were necessary.[409] Thus, once more, the Court placed the burden of proof on the state without doing so in 'strict scrutiny' vernacular.

It should be mentioned, however, that the Supreme Court has not totally abandoned the 'strict scrutiny' standard of review. The Court recently stated that it would still evoke this stringent test in cases concerning classifications based on race or alienage.[410] In Sugarman v. Dougall, the Court used strict judicial scrutiny to review a New York statute which discriminated against aliens in competitive class civil service positions.[411] The Court found that the statute was over broad and that the facts did not support the exclusion of all aliens from civil service jobs. The Supreme Court also struck down discriminatory classifications based on alienage in In re Griffiths, and concluded since alienage is a 'suspect classification', any distinctions based on this trait must "promote a substantial state interest."[412]

It is apparent from the above analysis of the Supreme Court's recent use of equal protection review that the Court has not yet become comfortable with an objective standard which it can consistently apply

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[408] Bullock v. Carter, 405 U.S. 135 (1972).

[409] Id. at 148.

[410] In re Griffiths, 413 U.S. 717, 727 (1973).

[411] 413 U.S. 634, 642 (1973).

[412] 413 U.S. 717, 727 (1973).

in evaluating the legality of state legislation. In some cases, the Court has rigidly adhered to the distinction between the 'strict scrutiny' and 'rational basis' doctrines. Thus, upon finding no 'fundamental interest' or 'suspect class' involved, the Court has reverted to the lenient form of the traditional standard. However, in other litigation, when the justices have felt personally that the state legislation was unjustly discriminatory, the Court has strictly scrutinized the state action under the guise of the 'rational basis' test. In still other cases, mainly dealing with classifications based on race or alienage, the Court has openly applied the "compelling interest doctrine" because a 'suspect class' has been identified. Even though the Court continues to sparingly use the 'strict scrutiny' standard, its mention of a 'fundamental interest' has been noticeably lacking in recent equal protection decisions.

The inconsistency in the Supreme Court's posture makes it difficult for classes of persons, who feel they are being discriminated against, to evaluate the perimeters of their constitutional rights. For some of these individuals, it may appear that the judicial analysis of equal protection claims is as discriminatory in nature as the alleged disadvantages resulting from the state action being questioned.

Future Directions For Equal Protection Review

It is evident that the Burger Court has moved away from the activist posture of the Warren era and seems hesitant to expand the scope of equal protection review. The Court, however, has not shelved the equal protection clause altogether. It is still using the clause

to invalidate state action, but is doing so without using 'strict scrutiny' language. An analysis of the litigation of the past few terms indicates that although the Supreme Court is reluctant to expand the category of 'fundamental interests', it does appear to be closely reviewing the nature of discriminatory classifications and the necessity for making such distinctions among persons in order to further state interests. Since the Supreme Court does not seem willing to abandon the social welfare area totally to the discretion of the legislative branch of government, the equal protection clause remains a viable tool for judicial initiation of educational reform.

Continuing Search for a Standard of Review to Protect Individual Rights

In the past few terms, the Supreme Court has jockeyed between employing equal protection and due process in its attempt to protect the individual from arbitrary state action. The Court has invalidated unjustified "irrebuttable presumptions" under due process guarantees and has struck down discriminatory classifications under equal protection mandates. As noted in the previous discussion of the evolving due process standard of review,[413] several recent cases involving discriminatory state legislation could have been decided using either of the two doctrines. For example, in Stanley v. Illinois, the Supreme Court could have invalidated the state action under either due process or equal

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[413] See Chapter III, text with notes 193-208, supra. Nowak has asserted that in Jackson v. Indiana and Humphrey v. Cady, the Court could have based its decisions on the individual's due process right to remain free from incarceration rather than on equal protection grounds. J. Nowak, supra note 56, at 1103. See text with notes 402-403, supra, for a discussion of these cases.

protection guarantees and decided to address both issues in its decision. The Court would not accept the 'irrebuttable presumption' that all unwed fathers were unfit parents and required procedural due process to substantiate this assumption in each individual case. In addition, the Court relied on the equal protection clause to invalidate the discriminatory treatment against the class of fathers of illegitimate children.[414] Likewise, in Eisenstadt v. Baird, the Court could have voided the state statute on due process grounds based on the individual's liberty to regulate his own role in procreation, the right to give and receive information, and the right to privacy. Instead, the Court chose to focus on equal protection guarantees in holding that the statute discriminated against the class of unmarried persons.[415] In two cases involving similar factual situations concerning discrimination in the distribution of food stamps, the Supreme Court handed down the decisions on the same day, but invalidated the state action under the equal protection clause in one case and under the due process clause in the other.[416]

Obviously, the Court is still searching for an objective standard of review and has not yet established a set of criteria which can be consistently applied in evaluating the constitutionally of legislative acts. Perhaps the judicial inconsistency concerning which doctrine to

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[414]405 U.S. 645 (1972). See text with note 393, supra.

[415]405 U.S. 438 (1972). See text with note 396, supra.

[416]United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (equal protection grounds), see text with note 400, supra; United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (due process grounds), see Chapter III, text with note 198, supra.

apply does not actually hinge on the distinction between due process and equal protection, but instead is based on the difference between reviewing legislative goals and the methods for their effectuation.[417] The Court seems hesitant to limit the perimeters of governmental purposes allowed, but it appears more confident in scrutinizing the means chosen by the state to achieve its purposes.

Judicial Inconsistencies in Recent Equal Protection Litigation

Several recent cases have surfaced incongruities in the Supreme Court's evaluation of legislation under the equal protection clause. It almost seems that the Court stands on quicksand, never able to get a solid footing. Regardless of the reasons for the incompatible rulings, the appearance is that the Court is not basing its decisions upon established principles of law.

The significance the Supreme Court has placed on the interpretation of 'state action' or 'state intent' required to constitute de jure discrimination under the equal protection clause holds particular importance for future educational reform.[418] Unfortunately, however, there seems to be a lack of consensus among members of the Court as to the definition of unconstitutional state action which disadvantages certain classes of people. For example, in the Denver desegregation case, Justice Powell claimed that racial discrimination which is "state-created or state-assisted or merely state-perpetuated should be irrelevant"

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[417] G. Gunther, supra note 365, at 23.

[418] Especially the desegregation litigation has focused upon the issue of 'state action', but this issue has implications for all discriminatory governmental practices affecting education.

to the constitutional principle, as it all constitutes 'state action'.[419] He further emphasized that school boards, by acts of omission or commission, are sufficiently responsible for discriminatory results.[420]

Justice Douglas also addressed the notion of state action in connection with racial segregation:

> When a State forces, aids, or abets, or helps create a racial "neighborhood," it is a travesty of justice to treat that neighborhood as sacrosanct in the sense that its creation is free from the taint of state action.[421]

In contrast, the 1974 Supreme Court ruling concerning desegregation in the Detroit area was couched in a different attitude toward 'state action'.[422] The Court noted that the state did not design the political subdivisions with segregation in mind, and it seemed to avoid the implications of state action by focusing on the lack of guilt evidenced by the local suburban districts involved in the Case. Thus, the Supreme Court totally sidestepped the fact that the state could be held constitutionally responsible for remedying the existing segregation, since the state initially created the school districts and retained ultimate responsibility for public education within its boundaries.

Also, in the Rodriquez case, the Supreme Court declined to address the state's responsibility for the inequities in educational funds

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[419]Keyes v. School Dist. No. 1, 413 U.S. 189, 227 (1973) (Powell, J., concurring in part, dissenting in part).

[420]Id. at 224.

[421]Id. at 216 (Douglas, J., separate opinion).

[422]Milliken v. Bradley, 94 S. Ct. 3112 (1974). See text with note 150, supra, for a discussion of this case.

among school districts.[423] It is difficult to reconcile the Court's reasoning in this case with its stance in the Detroit decision. Concerning Detroit, the Supreme Court concluded that the state was not obligated to eliminate school district segregation which resulted from housing patterns and other factors over which the state had little control. If this rationale is accepted as valid, then the Rodriguez decision appears to be illogical. Admittedly, the state cannot totally control the racial composition of neighborhoods,[424] but the state does have control over its means for financing public education and can alter such schemes by legislative action. In his dissenting opinion, Justice Marshall emphasized the de jure nature of the alleged wealth discrimination in the Rodriguez case: "It is the State that has created local school district, and tied educational funding to the local property tax and thereby to local district wealth."[425]

Another closely related inconsistency in judicial action is the Supreme Court's return to admiration for local control in education. It has been firmly established that the locus of responsibility in public education resides with the state and not with its political

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[423] 411 U.S. 1 (1973). See text with note 227, supra, for a discussion of this case.

[424] This rationale was also used in the desegregation case involving Richmond, Virginia, where the Fourth Circuit Court of Appeals concluded that the state could not be faulted for existing segregation other than for its inaction in funding low cost housing in certain areas. Bradley v. School Bd. of Richmond, Virginia, 462 F. 2d 1058 (4th Cir. 1972). See text with note 144, supra.

[425] 411 U.S. 1, 123 (Marshall, J., dissenting).

subdivisions.[426] In 1972, the Supreme Court observed: "Providing public schools ranks at the very apex of the function of a State."[427] Yet, that same year, Justice Stewart claimed: "Direct control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society."[428] Also, Chief Justice Burger asserted that local control is not only vital to continued support of the public schools, "but it is of overriding importance from an educational standpoint as well."[429]

In both Rodriguez and the Detroit decision, the Supreme Court majorities showed great reverence for local control in public education.[430] Justice Marshall, dissenting in Rodriguez, suggested that the concern for local control was being offered as an excuse for discriminatory practices rather than as a justification for them.[431] He also posed the question of how the Supreme Court would strike the appropriate balance when confronted with a situation "where the State's sincere concern for local control inevitably produced educational inequality."[432]

It is somewhat difficult for one to accept a state's espoused dedication to local control in education, when statewide laws regulate very specific details of the operation of all schools in the state. For

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[426]See Chapter II, text accompanying notes 12-21, supra.

[427]Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

[428]Wright v. Council of the City of Emporia, 407 U.S. 451, 469 (1972).

[429]Id. at 478 (Burger, C. J., dissenting).

[430]See Rodriguez, 411 U.S. 1, 49 (1973); Milliken v. Bradley, 94 S. Ct. 3112, 3125 (1974).

[431]Rodriguez, id. at 126 (Marshall, J., dissenting).

[432]Id.

example, regulations control the length of the school term, textbook adoption, school attendance, and certain aspects of the curriculum offered. It seems that the 'local control' asserted is narrowly defined and actually limited to control over fiscal matters and pupil assignment. It is certainly a weak demonstration of 'local control', when a school district cannot hope to match neighboring districts in financial resources for education, even if it should decide to access the highest tax rate in the state. Perhaps the concept of local control in education is "illusory" and "control for the wealthy, not for the poor."[433] Justice Marshall has claimed that if there is real dedication to local control, then equalization of educational resources within a state would enhance opportunities for decisions concerning education to be made at the local level.[434]

One additional inconsistency in the Supreme Court's interpretation of the equal protection clause warrants brief attention. In recent litigation, there has been controversy over the necessity to establish an 'identifiable class' of individuals who have been disadvantaged by the discriminatory state action. For example, in Bullock v. Carter, the Supreme Court found no impediment to invalidating the Texas filing fee system for primary elections, although the members of the disadvantaged class could not be readily identified.[435] In contrast, the Rodriguez majority relied on the fact that there was no 'identifiable

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[433]Robinson v. Cahill, 118 N.J. Super. 223, 287 A. 2d 187, 211 (1972).

[434]Rodriguez, 411 U.S. 1, 127-30 (1973) (Marshall, J., dissenting).

[435]405 U.S. 134, 144 (1972). See Rodriguez, id. at 93.

class' discriminated against as part of the rationale for upholding the Texas scheme for financing public schools.[436]

Conceivably, the incongruent behavior exhibited by the Supreme Court in equal protection analysis can be partly explained by the differences in character of the issues involved in various cases. When litigation has involved complex questions relating to the sovereign powers of the state, such as the state's dominion over its system of taxation and distribution[437] or its authority to design the political subdivisions within its borders,[438] the Supreme Court has seemed hesitant to protect the individual's interests at stake. However, in cases where there has been clear and unmistakable discrimination against persons, without confounding governmental ramifications, the Court has been more assertive in guarding the individual's rights.[439] Thus, a search through the tangled maze of equal protection litigation does not reveal established principles of law which have been consistently applied throughout all cases.

Wanted: Equal Protection of the Laws

The final authority in interpreting the Constitution is vested in the nine members of the United States Supreme Court; therefore, it is understandable that the translation of equal protection guarantees has changed with the shifting composition of the Court. The elements of both the traditional 'rational basis' doctrine and the 'strict scrutiny'

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[436]Rodriguez, 411 U.S. 1, 19-29 (1973).

[437]Id.

[438]See text with notes 144-59, supra, for a discussion of desegregation cases involving this issue.

[439]See Lau v. Nichols, 414 U.S. 563 (1974).

doctrine have been the result of judicial attempts over the years to interpret what the framers of the fourteenth amendment meant by 'equal protection of the laws', and it must be concluded that neither standard has been found to be completely satisfactory.

An ironical situation is presented by the justices who have voiced disdain over court-declared 'fundamental interests' which are not explicitly mentioned in the Constitution, because the entire concept of 'fundamental interests' or 'strict scrutiny review' is not explicitly stated or even implied in the constitutional mandate concerning 'equal protection of the laws'. Nowhere does the fourteenth amendment imply the necessity for establishing a 'fundamental interest' or identifying a 'suspect classification' in order to scrutinize discriminatory state action. Likewise, the 'rational basis' doctrine, with its dependence on any conceivable relationship between legislative 'means' and 'ends', is not grounded in the equal protection clause. Perhaps members of the judiciary and legal scholars have become so preoccupied with analyzing and reinterpreting the court-created standards that they have lost sight of the factual statement in the amendment itself. More effort seems to have been devoted to evaluating the fundamentality of personal interests or searching for conceivable legislative relationships than to studying the meaning of the actual constitutional mandate of 'equal protection of the laws'.

Since the use of the 'strict scrutiny' doctrine invariably has meant invalidation of the state action, this approach has almost forced the Supreme Court into the posture of severely limiting the number of rights identified as 'fundamental' and the number of classes labeled

'suspect'. Otherwise, the Court would soon find itself capable of invalidating any challenged legislative act. Possibly the framers of this 'compelling interest' standard were reading too much into the constitutional requirements for evoking equal protection guarantees. The clause implies that the state cannot discriminate against persons similarly situated, but it does not imply that a constitutional right must be at stake in order to create valid grounds for an equal protection claim. Instead of offering more protection to the disadvantaged individual, the existence of the 'strict scrutiny' doctrine has actually had the opposite effect in several recent cases. Due to judicial fear of usurping legislative discretion, the Court has often retreated to the traditional 'rational basis' doctrine when feeling pressed to make a choice between the two standards. This fact has aroused much criticism of the rigid application of the two-tiered (either/or) test. The 'rational basis' doctrine offers even less assurance that the individual will receive his proper guarantee of equal protection of the laws, as it has been noted for its judicial 'hands off' posture. Inherent problems also accompany application of this standard, as the 'rational basis' test has become associated with total leniency and the Court's acceptance of almost any conceivable relationship between a state purpose and the means for its achievement.[440]

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[440] It is interesting to note that Justices Brennan and White dissented in Rodriguez on the rationale that the Texas scheme for financing public schools could not even pass the traditional 'rational basis' test, since there was no conceivable relationship between the state purpose of providing public schools for all citizens and the means chosen to finance such schools. 411 U.S. 1, 62 (1973) (Brennan, J., dissenting); id. at 68 (White, J., dissenting).

Thus, the problem with the former doctrine has been its potential for arrogating legislative power, while the problem with the latter standard has been its impotence in protecting the individual's rights.

Perhaps the Supreme Court's recent inconsistent behavior in equal protection analysis has indicated its desperate search to attain a middle ground in reviewing the legality of state action. Hopefully, the Court's efforts will evolve into a reasoned standard which will strike the proper balance between judicial intervention and abstention and will enable the individual to recognize the perimeters of his constitutionally protected rights. Viewing recent developments optimistically, one can retain faith in the vitality of equal protection review. The Supreme Court seems to be concentrating on the methods used to achieve legitimate state purposes which must be based on fact and not mere conjecture. If the Court continues to closely examine classifications which discriminate against individuals on the basis of neutral criteria such as illegitimacy, alienage, race, sex, and other uncontrollable traits relating to a person's status, then there are numerous possibilities for educational reform based on equal protection grounds, even if education is never declared to be a 'fundamental interest'.

The Supreme Court has before it the challenge to formulate consistent standards for enforcing equal protection of the laws. If it can unravel the snare surrounding the meaning of 'state action' and delineate the obligations placed on the state to eliminate discriminatory governmental practices, perhaps the questions concerning the individual's rights to equal educational opportunities will be finally answered.

CHAPTER V

FINDINGS, CONCLUSIONS, AND OBSERVATIONS

There is no mystery as to why egalitarian efforts over the past few decades have focused on the public schools. First, many people feel that education offered to all citizens on an equitable basis will be the best way to solve the massive problems plaguing this modern technological society. Yudof has asserted that most Americans see "fundamental political, social, and economic changes in educational terms."[1] As a theoretical concept, 'equal educational opportunities' is firmly rooted in democratic philosophy and shares an exalted position with monogamy, brotherhood, and peace. Justice Frankfurter has described the public school as "the symbol of our democracy and the most persuasive means for promoting our common destiny."[2] However, when this theoretical ideal meets brash reality, the consensus quickly dissipates concerning the desirability of quality and equality in educational opportunities for all citizens. Thus, the applauded principle becomes somewhat distorted when it is translated into concrete educational policies and programs.

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[1]M. Yudof, "Equal Educational Opportunity and the Courts," 51 Tex. L. Rev. 411 (1973).

[2]McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

Another reason public education has been the forum for much recent litigation concerning the protection of personal rights is the fact that public schools provide a more accessible target than is furnished by the private sector for judicially required societal reform. Crime, poverty, and other social ills certainly are not planned governmental results, and the state often cannot directly control or solve such problems. However, public education is governmentally controlled, and the state does have the power to eliminate discriminatory practices in public schools.[3]

A third reason that educational litigation has increased dramatically in federal courts since the 1950s is because there has been a change in judicial interpretation of the state's constitutional duty to eradicate arbitrary or discriminatory practices. The original Bill of Rights was written in an essentially negative tone.[4] It raised barriers against governmental intrusion, and in other words, specified certain areas where the individual was to be left alone. However, under the Warren Court more obligations were placed on the state to promote "liberty, equality, and dignity." Cox has called this duty "the most creative force in constitutional law."[5]

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[3]See J. Coons, W. Clune, & S. Sugarman, Private Wealth and Public Education 7 (1970).

[4]A. Cox, "The Supreme Court 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights," 80 Harv. L. Rev. 91, 94 (1966).

[5]Id.

The "Janus Face of Precedent"[6]

A review of judicial precedent concerning the individual's constitutional relationship to public education is filled with many contradictions and complex elements. An objective attempt to unravel the substance of constitutional litigation, in hopes of finding a logical pattern that will lead to concrete principles of law, leaves one feeling that he has been placed in the midst of a disarranged china shop.

One factor which complicates an analysis of judicial precedent is the changeable nature of the legal vocabulary used to refer to constitutionally preferred personal interests. New judicial vernacular is periodically devised, and terms such as 'ordered liberty', 'fundamental interest', 'preferred liberty', 'protected right', 'irrebuttable presumption', and 'suspect classification' remain popular for an interval of time and then perhaps disappear or are revived later with different shades of meanings. This situation is further complicated when judges attempt to establish principles of law by comparing two cases which may be couched in different judicial language. Thus, the vocabulary in 'current vogue' may not have the same interpretation as the terms used in an earlier case which is being relied upon as precedent. Obviously, it becomes very easy for the legal semantics to obscure the substance of judicial decisions.

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[6]Llewellyn has used this phrase to refer to Supreme Court precedent. K. Llewellyn, The Bramble Bush 149 (1930).

Another inherent problem in analyzing judicial precedents is that principles of law are subject to the personality dynamics of judges, especially the nine justices sitting on the Supreme Court. The outcome of school litigation often depends on the judges' perceptions of what the student-school relationship should be, and the final decision in a case may be based as much on sentiment as on an objective evaluation of the factual situation and its relationship to the Federal Constitution. The judges' attitudes and philosophies can result in selection of 'appropriate precedent' for a specific case to support their personal biases. Llewellyn has noted that "every doubtful point is answered both ways by authority,"[7] which in essence means that the Supreme Court has wide discretion in interpreting the protections included in the United States Constitution. Perhaps this set of circumstances motivated Justice Jackson to observe that "constitutional precedents are accepted only at their current valuation."[8]

The fact that Supreme Court decisions depend on the interaction of the personal values of the justices may account for some of the inconsistencies in recent rulings concerning the individual's rights to education. Since there is a wide philosophical breach among the justices currently sitting on the bench, the large number of unanimous decisions handed down during the Warren era is noticeably lacking with the Burger

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[7] Id.

[8] R. Jackson, "Task of Maintaining Our Liberties," 39 A.B.A.J. 962 (1953).

Court. If the strict constructionist justices comprise the majority in a decision, it seems that the individual's constitutional rights to an education are deemphasized, inequalities are often justified, and local control in education is highly praised.[9] However, if the majority of the Court shifts the other way, the individual's constitutionally protected right to an education which cannot be denied without fair procedures is proclaimed, and the state's obligation to fulfill its reponsibility in public education is underscored.[10] Thus, decisions handed down within a two year period which practically contradict each other cause one to view judicial precedent with the 'clarity of dissonance'.

One final comment is warranted concerning an analysis of Supreme Court precedents involving the individual's rights to a public education. School law has been referred to as a "hybrid of principles," established inside and outside the public school domain.[11] There is no distinct body of educational litigation that one can look to for answers concerning the citizen's constitutional relationship to education. Since many of the principles established in non-school cases hold particular relevance for decisions affecting the individual's right to an education, one must look at the entire scope of constitutional law

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[9]See Rodriguez, 411 U.S. 1 (1973); Milliken v. Bradley, 94 S. Ct. 3112 (1974).

[10]See Goss v. Lopez, 43 U.S.L.W. 4181 (U.S. Jan. 22, 1975). See also Lau v. Nichols, 414 U.S. 563 (1974), where the Supreme Court held that Chinese-speaking children were entitled to a program appropriate to their needs.

[11]R. Sealey, "The Courts and Student Rights--Substantive Matters," Eric Reports, ED 057 494, November, 1971, at 44.

in evaluating precedent which may apply to public schooling. The intricacies seem to multiply in geometric progression as one scans the various court-determined rights and attempts to draw analogies that will shed light on the individual's right to an education. In a Second Circuit student discipline case, Judge Kaufman noted the uncertainties involved in reaching a sound decision by applying legal precedent in the area of school law:

> The best one can hope for is to discern lines of analysis and advance formulations sufficient to bridge past decisions with new facts. One must be satisfied with such present solutions and cannot expect a clear view of the terrain beyond the periphery of the immediate case. It is a frustrating process which does not admit of safe analytic harbors.[12]

Findings and Conclusions

A review of litigation involving the individual's constitutional relationship to public education has surfaced several findings of fact and conclusions of law. These findings and conclusions concern (a) the legal framework for citizens to assert their constitutional rights to education, (b) due process liberty guarantees, (c) equal protection requirements, and (d) procedural due process mandates.

The Legal Framework

It is a finding of this study that the locus of responsibility in public education resides with the state and not with the federal government or with the state's political subdivisions.[13] Therefore, the state

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[12]Eisner v. Stamford Bd. of Educ., 440 F. 2d 803, 804-05 (2d Cir. 1971).

[13]See Chapter II, text accompanying notes 6-21, supra.

legislature and its various agents (e.g., local school boards) are responsible for the type and quality of public education made available within the state and for the equality of such opportunities for all residents.

Although the state is responsible for public education, it is a finding of law that the state must operate its public schools within the perimeters of the United States Constitution and that no state statute or regulation can be held above Supreme Court interpretations of constitutional mandates.[14] Thus, the federal judiciary intervenes in the state's control and operation of its public schools only when a federal constitutional issue is at stake.

It is also well established that the individual must attack discriminatory state action, which impairs constitutionally protected rights, through the guarantees of the fourteenth amendment. The Supreme Court has declared that fourteenth amendment liberties include the personal freedoms of the Bill of Rights and certain other implied constitutional rights which also are afforded full fourteenth amendment protection against arbitrary state interference.[15] Hence, the status of an individual's constitutional relationship to public education is ascertained by analyzing substantive and procedural rights of the due process clause and guarantees of the equal protection clause of the fourteenth amendment to the United States Constitution.

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[14]See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Cooper v. Aaron, 358 U.S. 1, 17-18 (1958); Chapter IV, text accompanying note 91, supra.

[15]See Chapter III, text accompanying notes 17, 22-28, supra.

Education and Due Process 'Liberty' Guarantees

It is a conclusion of this study that Supreme Court precedents are not consistent as to whether education is afforded constitutional protection as an 'implied liberty' under the due process clause. This conclusion is based on an appraisal of Supreme Court educational adjudication from 1923 until January, 1975. It is further concluded that many lower federal courts have been more explicit and consistent than the Supreme Court in declaring that the individual has a constitutionally protected 'liberty interest' in obtaining a public education.[16]

From a review of the following decisions, it seems that the constitutional right to an education as a protected liberty has been proclaimed and then repossessed by the Supreme Court on a cyclical basis. The 1923 Supreme Court ruling in Meyer v. Nebraska[17] often is cited to substantiate that the individual has a constitutionally protected 'liberty to learn' and 'right to acquire useful knowledge'.[18] Also, the Supreme Court proclamations in the Brown and Bolling desegregation cases are used to support the thesis that the individual has a substantive right to an education provided by the state.[19] In contrast, the 1973 Rodriguez majority declared that education is not afforded explicit or even implied constitutional protection.[20] However,

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[16]See generally Chapters III & IV, supra.

[17]262 U.S. 390 (1923). See Chapter III, text with note 46, supra.

[18]See Vail v. Bd. of Educ. of the Portsmouth School Dist., 354 F. Supp. 592, 602 (D.N.H. 1973); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Chapter III, text with notes 122, 242, supra.

[19]See Chapter III, text with notes 53, 54, supra; Chapter IV, text with notes 82, 87, supra.

[20]411 U.S. 1 (1973). See Chapter III, text with note 65, supra; Chapter IV, text with notes 227-45, supra.

in 1975, the Supreme Court ruled in Goss v. Lopez that suspended students who had not been provided procedural safeguards were unconstitutionally deprived of their liberty (as well as their property right) under the fourteenth amendment.[21] The Goss majority reasoned that the denial of public education without due process of law imposed a stigma on the individual in violation of the person's 'liberty' to maintain his good reputation.[22]

The varying rationales used by the Supreme Court to either afford constitutional protection to education or withhold such protection lend credence to Justice Powell's recent remarks concerning the Court's inability to determine "unquestioned constitutional rights":

> One need only look to the decisions of this Court--to our reversals, our recognition of evolving concepts, and our five-to-four splits--to recognize the hazard of even informed prophecy as to what are 'unquestioned constitutional rights'.[23]

The clouds of ambiguity surrounding the individual's substantive right to an education make the Supreme Court appear stalled in the midst of alternative directions, each with notably different repercussions for both the rights of the individual and the powers of the state. The Court seems prone to afford greater protection to the individual's right to an education if the factual situation does not involve ramifications

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[21]43 U.S.L.W. 4181 (U.S. Jan. 22, 1975). See Chapter III, text with note 139, supra. See also notes 44, 48, infra, for further discussion of implications of this case.

[22]The Goss majority based its conclusion on the precedent established in Wisconsin v. Constantineau, 400 U.S. 433 (1971). See Chapter III, text with notes 147, 165, supra, for a discussion of this case.

[23]Wood v. Strickland, 43 U.S.L.W. 4293, 4300 (U.S. Feb. 25, 1975) (Powell, J., concurring in part, dissenting in part).

which might create tension in the delicate balance between the authority of the federal government and the powers of the state. The Court has been particularly hesitant to interfere with the state's traditional functions of taxation and distribution and/or control over the design of the political subdivisions of the state.[24]

It is also concluded from a review of educational litigation that the Supreme Court is more inclined to include education as a substantive, fundamental liberty in cases of its total denial than in situations of its relative deprivation. Since the state's purpose is to educate the children of the state, the total exclusion of some children from public schools cannot be considered even rationally related to the state's own asserted interests.[25]

Several Supreme Court decisions lend support to this conclusion. In 1964 the Court invalidated state action to close public schools in one county of a state while public schools in other counties were maintained.[26] The Court would not tolerate the state's attempt to exclude a portion of eligible students from public educational opportunities. Also, in Wisconsin v. Yoder the Supreme Court stressed the need for all children to receive at least a basic education. Although this case resulted in Amish children being exempted from compulsory attendance laws after finishing eighth grade, the Court emphasized that "some degree

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[24]Compare the Supreme Court decisions in Rodriguez, 411 U.S. 1 (1973) and Milliken v. Bradley, 94 S. Ct. 3112 (1974) with the decisions in Goss v. Lopez, 43 U.S.L.W. 4131 (U.S. Jan. 22, 1975) and Lau v. Nichols, 414 U.S. 563 (1974).

[25]P. Dimond, "The Constitutional Right to Education: The Quiet Revolution," 24 Hast. L. J. 1087, 1106 (1973).

[26]Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964). See Chapter IV, text accompanying note 95, supra.

of education is necessary to prepare citizens to participate intelligently in our open political system if we are to preserve freedom and independence."[27]

The Supreme Court ruling in Goss v. Lopez and lower courts' protection of the rights of handicapped, married, and pregnant students to attend school add further support to the conclusion that the total denial of public education to selected students, without procedural safeguards, violates the fourteenth amendment.[28] Even the controversial Rodriguez decision can be used to support the contention that absolute deprivation of education would not be tolerated by the Supreme Court. The Rodriguez majority explicitly stated that the plaintiffs' claims could have had merit if the state had failed to provide the opportunity for children "to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[29]

Although it is a conclusion of this study that the Supreme Court would not condone a state's arbitrary denial of education to citizens, it is a finding of law that the Court has not interpreted the Constitution as providing an inherent right for the individual to demand an education provided by the public. Supreme Court rulings leave uncertainties as to whether education is considered an implied fourteenth amendment 'liberty', but the Court has not afforded explicit constitutional protection to education under either the first or ninth amendments.

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[27]406 U.S. 205, 221 (1972). See Chapter II, text with note 69, supra.

[28]See generally Chapter III, supra.

[29]411 U.S. 1, 36-37 (1973). See Chapter III, text with note 148, supra.

However, the Court often has recognized that some degree of education is necessary for the individual to exercise first amendment rights and has repeatedly noted its high esteem for education as the foundation of a democratic society.[30] If the Supreme Court should decide to interpret the first amendment as protecting 'the right to education' as a peripheral right, necessary to render explicit first amendment freedoms meaningful, then it is a conclusion of law that states would be precluded from disbanding public schools altogether. Also, the basis for attacking arbitrary practices in public education would be strengthened. Although no litigation to date has tested whether a state would be allowed to dismantle its entire public educational system, precedents suggest that the Supreme Court would find grounds to declare such action repugnant under the Federal Constitution.

Education and Equal Protection Guarantees

The equal protection clause does not create rights; it only classifies them and affords various degrees of constitutional protection to certain personal rights. It is a conclusion of this study that the Supreme Court has not formulated objective standards which have been consistently applied in reviewing legislation under the equal protection clause. Furthermore, the Court has not defined the nature of 'equality'

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[30]See Rodriguez, id.; State of Wisconsin v. Yoder, 406 U.S. 205 (1972); Epperson v. Arkansas, 393 U.S. 97 (1968); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Sweezy v. New Hampshire, 354 U.S. 234 (1956); McCollum v. Bd. of Educ., 333 U.S. 203 (1948); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

required in public schools, so the perimeters of the individual's right to equal educational opportunities remain uncertain. The various standards 'selectively' used by the Supreme Court to enforce equal protection of the laws indicate that the Court is still searching for an interpretation of the constitutional mandate which will create a proper balance between judicial intervention and abstention in the affairs of state legislatures.

Even though the Court's behavior concerning equal protection review has not followed a consistent pattern, the Supreme Court has established that it will not tolerate unlawful racial discrimination in public education. The single most significant event in the egalitarian movement to protect the rights of minority groups was the Supreme Court's proclamation in Brown that once a state provides education, "it is a right which must be made available to all on equal terms."[31]

If the Brown mandate had been uniformly enforced over the past two decades, many of the current controversies plaguing educational reform efforts would be moot issues. Unfortunately, the Brown ruling left unanswered questions concerning implementation of the constitutional requirements, and as the composition of the Supreme Court has changed, the constitutional protections enunciated in Brown have taken on different interpretations. The de jure/de facto controversy continues

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[31] 347 U.S. 483, 493 (1954). See Chapter IV, text with note 85, supra.

as the Court has not defined the degree of 'state intent' required to constitute unlawful 'state action'.[32] Thus, it is concluded that members of the Supreme Court have not reached consensus as to whether the state must actively attempt to disadvantage certain classes of persons in order to be held responsible for de jure discrimination or whether acts of omission or acts of the state's political subdivisions can be grounds for judicial enforcement of the state's obligations to eradicate inequalities in public education.

If the state's responsibilities concerning racial discrimination were clearly delineated, the impact on the entire field of public education would be significant, since the ever-lurking claim of racial prejudice is allied with other types of unequal treatment in public schooling. Allegations of discrimination on the basis of ability, handicaps, and poverty often have been accompanied by racial overtones. Although discriminatory practices involving race and wealth are not irrevocably entwined, they have often worked as a team in educational litigation. Perhaps this fact prompted Justice Douglas to remark in his dissenting opinion in the Detroit desegregation case:

> Today's decision given Rodriguez means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the Black schools are not only "separate" but "inferior."[33]

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[32] See Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Milliken v. Bradley, 94 S. Ct. 3112 (1974); Chapter IV, text with notes 126, 150, supra.

[33] Milliken v. Bradley, id. at 3135 (Douglas, J., dissenting).

The New Jersey Superior Court also addressed this issue in Robinson v. Cahill and relied on the widely publicized Coleman research in concluding that "to equalize educational opportunities significantly, de facto segregation of minority pupils must be overcome in addition to equalizing funds and facilities."[34]

Although the Supreme Court seems perplexed over determining the nature of 'state intent' required to constitute unlawful school practices, many lower federal courts have used equal protection grounds to invalidate discrimination in public education based on sex, achievement, marriage, pregnancy, and handicaps.[35] Also, the Supreme Court recently has nullified discriminatory state classifications based on illegitimacy, alienage, marriage, sex, and other 'neutral criteria', even though the the cases have not involved school situations.[36] These Supreme Court rulings indicate that the Court should strike down discriminatory practices in public education based on similar neutral classifications relating to a person's status at birth or his unalterable traits. It must be acknowledged, however, that the Court's Rodriguez ruling runs in opposition to the above conclusion as the majority did not find discrimination on the basis of school district wealth to be unconstitutional, even though a child's place of residence and the financial circumstances of his parents surely must be considered 'neutral factors', like race or sex, over which the child has no control.

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[34]287 A. 2d 187, 203, n. 15 (1972), referring to J. Coleman et al., Equality of Educational Opportunity (1966).

[35]See generally Chapter IV, text with notes 311-59, supra.

[36]See Chapter IV, text accompanying notes 381-98, supra.

In upholding the validity of Texas' system for funding public schools, the Rodriguez majority relied on the fact that no citizens suffered from an absolute denial of educational benefits.[37] The Court was not convinced that the relative value of education in a competitive society made inequality entail similar injuries as total deprivation. Thus, the Court reasoned that provision of a minimum education for all children satisfied the constitutional requirement of equal protection of the laws. However, in desegregation litigation, the fact that the state has supplied an 'adequate' education for all students has been an insufficient rationale for maintaining unlawfully segregated and unequal educational opportunities.[38] It is concluded, therefore, that the Court has required various standards of 'equality' in public schools depending on the nature of the discriminatory classifications involved.

Since the Burger Court has moved away from the activist posture of the Warren era, it is difficult to plot the future course of Supreme Court rulings dealing with situations of relative deprivation in public education. The Court has seemed wounded by the semantical combat involved in application of the rigid two-tiered equal protection test. The pressure to choose between the 'rational basis' standard or 'strict scrutiny' review has caused several decisions to appear illogical in view of prior holdings.[39] The 'strict scrutiny' doctrine, designed and used by the Warren Court to afford greater protection to individuals suffering from discriminatory state action, ironically has had an opposite effect in several recent cases. Since the use of this test has invariably

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[37]411 U.S. 1, 23-24 (1973).

[38]See Chapter IV, text accompanying notes 83-159, supra.

[39]See Chapter IV, text accompanying notes 418-38, supra.

meant invalidation of the state legislation, fear of rendering legislatures impotent has often caused the Burger Court to retreat to the lenient 'rational basis' test as the only available alternative.[40]

Considering the fact that neither of these doctrines is specified in the constitutional mandate of 'equal protection of the laws', it appears that the Court has become so absorbed in reinterpreting the criteria for applying these judicially created standards, that it has become sporadic in actually guaranteeing equal protection to citizens. For some individuals, the Court's use of equal protection analysis may seem as discriminatory in nature as the state action being challenged.

Although the fourteenth amendment implies that persons similarly situated must receive similar governmental treatment, it does not infer that a constitutional right must be abridged in order to violate equal protection mandates. Thus, it is a conclusion of law that the identification of a fundamental right which has been impaired is not a necessary prerequisite for judicial enforcement of equal protection guarantees. Possibly the Supreme Court's recent tendency to deemphasize 'fundamental interests' and concentrate on the necessity of governmental classifications to achieve valid state purposes is its attempt to become emancipated from the limitations of both former standards used to evaluate claims under the equal protection clause.

Protected Property Interests and Procedural Due Process

During the last few terms the Supreme Court has placed more stress on the constitutional requirement of fair procedures in its analysis of

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[40] See Chapter IV, text with notes 439-40, supra.

alleged discriminatory state action. In several cases violating both equal protection and due process guarantees, the Supreme Court has held that the state cannot create 'irrebuttable presumptions' about classes of persons without providing procedures for the presumption to be substantiated on an individualized basis.[41] The Court has also repeatedly rejected the claim that governmental interests in economy and efficiency can justify state attempts to dispense with due process hearings.[42] The Court has further ruled that some interests which are not explicit constitutional rights must be afforded procedural due process since the individual has a fourteenth amendment 'property right' established by state laws and regulations.[43]

In Goss v. Lopez, the Supreme Court held that the student has a state-created protected property right to education.[44] Thus, it is a conclusion of law that students have a legitimate claim of entitlement to public education since the state has decided to provide such opportunities and has made schooling mandatory. Many lower courts also have explicitly required that the state respect the student's right to attend school in cases involving pregnant, married, handicapped, and suspended students, and further have demanded that the state provide

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[41] See Chapter III, text accompanying notes 191-97, supra.

[42] See Goldberg v. Kelly, 397 U.S. 254 (1970); Mayer v. Chicago, 404 U.S. 189, 197 (1971); Graham v. Richardson, 403 U.S. 365, 374-75 (1971); Bell v. Burson, 402 U.S. 535, 540 (1971); Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

[43] See Connell v. Higginbotham, 403 U.S. 207 (1971); Morrissey v. Brewer, 408 U.S. 471 (1972); Wolff v. McDonald, 418 U.S. 539 (1974).

[44] 43 U.S.L.W. 4181, 4184 (U.S. Jan. 22, 1975). See Chapter III, text accompanying notes 75, 135, supra.

procedural due process before the students' rights can be impaired.[45] In addition to protecting the individual's right to school attendance, several lower courts have guaranteed the student's right to procedural safeguards regarding program placement, and some courts have held that compulsory schooling can be justified only by furnishing educational benefits suited to the student's needs.[46]

In Lau v. Nichols the United State Supreme Court ruled that Chinese-speaking children in San Francisco were entitled to instruction suited to their unique needs since school attendance was mandatory. Although this case was decided on the grounds that it violated the Civil Rights Act of 1964, the Court's opinion is germane to a discussion of the individual's rights to an education. The Court definitively stated that requiring students to learn English skills on their own before they can effectively participate in the school program "is to make a mockery of public education."[47] This ruling coupled with the Supreme Court decision in Goss leads to the conclusion that the student can assert his protected interest in school attendance and in appropriate instructional programs.

The implications of the Court's declaration in Goss, that a student has a protected property right to education, may be far reaching indeed. Justice Powell heeded this warning in his vehement dissenting opinion:

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[45]See generally Chapters III & IV, supra.

[46]See Mills v. Dist. of Columbia Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972); P.A.R.C. v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972); Lau v. Nichols, 414 U.S. 563 (1974).

[47]Lau v. Nichols, id. at 566.

> No one can foresee the ultimate frontiers of the new "thicket" the Court now enters. Today's ruling appears to sweep within the protected interest in education a multitude of discretionary decisions in the educational process.[48]

He further claimed that the Supreme Court majority justified "this unprecedented intrusion" into the domain of public education "by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing. . . ."[49] Justice Powell asserted that even if the case did involve an "arguable infringement" against the student's interest in education, "it is too speculative, transitory, and insubstantial to justify imposition of a constitutional rule."[50]

From an analysis of the Supreme Court decisions involving education during the past three years, it appears that the Court has changed horses in midstream, or perhaps more accurately, the five to four majority has shifted once more. In Rodriguez, the individual's interest in education was not even afforded implied constitutional protection, while in Goss, the student's property interest in education was guaranteed full protection of due process of law. If the reasoning of the Rodriguez majority is followed, then education must be 'grounded' in the text of the Constitution in order to evoke strict judicial scrutiny under equal protection review.[51] Justice Powell, writing for the Rodriguez majority, discussed

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[48] 43 U.S.L.W. 4181, 4191 (U.S. Jan. 22, 1975) (Powell, J., dissenting).
[49] Id. at 4187.
[50] Id.
[51] 411 U.S. 1, 31-35 (1973).

at length the implied fundamental rights (e.g., the rights to interstate travel, to vote in state elections, and to criminal appellate review) which receive the same degree of constitutional protection as explicitly stated rights because they have been judicially interpreted as substantive 'liberties' and thus have become 'firmly rooted' as constitutional rights.[52]

If the Rodriguez rationale is accepted as an established principle of law, then the Goss declaration that education is a property right, protected by the due process clause, supplies the necessary 'firm constitutional roots' for discriminatory state action involving education to receive strict judicial scrutiny under the equal protection clause as well as under due process guarantees. Either the Supreme Court is embarking on a route toward making a distinction between judicial protection afforded to 'liberty interests' versus 'property interests' (or is determining constitutional rights in one manner for equal protection review and in another for due process analysis) or it must be concluded that a protected property right is entitled to the same degree of protection as any other constitutional right.[53]

Since procedural due process is required only when life, liberty or property interests are impaired by the state, it seems of little consequence regarding the end result of ensuring fair procedures whether the right is an 'inherent liberty interest' or a 'state-created property

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[52]Id. at 35-38.

[53]Perhaps this apparent inconsistency in logic is one reason that the Supreme Court has recently focused on the nature of classifications in equal protection review, and the term 'fundamental interest' has been noticeably absent in the Court's decisions.

right', because both receive constitutional protection under the fourteenth amendment. This point is especially salient to property interests in the realm of public education, as it does not appear likely that the states will decide to eliminate the expectation of this benefit in the near future. Furthermore, as mentioned previously, even if a state did decide to dismantle its public schools, precedents suggest that the Supreme Court would find a constitutional basis for disallowing such action.

Although procedural safeguards offer no panacea for eliminating the inadequacies and inequities in public education, they can provide a forum for unjust school practices to be exposed and objectively evaluated. Fair procedures in themselves cannot ensure minimum educational opportunities for all citizens or equality among public schools within a state, but they can guarantee disadvantaged individuals a chance to plead their cause and require the state to demonstrate a valid rationale for any arbitrary or discriminatory treatment in public education.

Whether mandated on equal protection grounds, due process grounds, or a merger of the two, the enforcement of fair procedures can serve as a catalyst for equalizing public educational opportunities and providing programs suited to the needs of the students. Dimond has remarked that in most school situations, "the source and statement of the rights to education do not alter the actual impact of judicial intervention into school affairs."[54] Whatever the constitutional

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[54]P. Dimond, supra note 25, at 1122.

basis for court-required reform may be, the ultimate result is a brighter fate for children.

Perhaps the procedural due process approach is the Supreme Court's attempt to assume the appropriate role in protecting the rights of individuals without rendering state legislatures powerless. This approach still allows the state great freedom in designing alternative solutions to educational problems without the fear that the state action will be overruled on "sweeping equal protection grounds."[55]

By focusing on enforcement of fair procedures, the judiciary also avoids the puzzling issues of defining 'equality' and establishing standards for evaluating the educational needs of individual pupils. Specific decisions concerning programs are left to the expertise of state legislatures and professional educators, while the judicial role is to ensure that fair procedures are followed in making such determinations. Perhaps the future will validate that the 'procedural due process route' is an advantageous means for achieving substantial reform in public schools.

A Hierarchy of Rights?

It can be hypothesized from a review of constitutional litigation that the most stable right to a public education would be formed by a judicial declaration that education is an inherent first amendment freedom. Under such circumstances, education would always receive fourteenth amendment protection, and the state would not have the option

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[55]"Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to LaFleur," 62 Geo. L. J. 1173, 1200 (1974).

of disbanding educational opportunities at the will of the legislature. The next strongest basis for a constitutional right to an education would be judicial confirmation that education is an 'implied liberty' or 'substantive right' under either the ninth or fourteenth amendments. A definitive judicial stand to this effect would eliminate dependence on state action for the creation of a property right to education and again would ensure consistent fourteenth amendment protection of the individual's right to public schooling.

It can be speculated that the next rung on the ladder of rights would be a Supreme Court proclamation that all children constitute a 'suspect', powerless class, which would mean that all state policies and practices discriminating against children in public education would be subject to strict judicial scrutiny under the equal protection clause. Such a judicial posture could result in equalization among public schools within a state, but it would not necessarily elevate 'education' to the status of a fundamental liberty. Likewise, a firm judicial stance concerning the unconstitutionality of any state action discriminating against students on the basis of their status at birth or their unalterable traits (e.g., handicaps, sex, or poverty) would promote equal opportunities for all students regardless of the 'fundamentality' of education. Possibly the least stable constitutional basis for a right to education is the protected property right created by the state, as it does depend on state action for the citizen to claim entitlement to the right.

This hypothetical design of a hierarchy of rights, however, may be viewed as a purely academic exercise, since it can be argued that a

protected property right is just as valid as any other constitutional right. Following this line of reasoning, a personal interest which the Supreme Court declares is a right should receive full constitutional protection. The rationale used by the Court in making its determination is actually of secondary importance in evaluating the degree of judicial protection which must be afforded to the interest involved. Therefore, regardless of the legal semantics used to establish the constitutional foundation for affording protection to education, the current prospects seem encouraging for the individual to assert his constitutional right to public schooling.

Additional Observations

The judiciary always has faced the dilemma of deciding whether individual interests or state interests should receive the preferred position in evaluating the constitutionality of school policies and practices. Is the public school designed to benefit the individual or is the individual considered to be the servant of the public educational system in order to further the goals of society in general? Or is there a middle ground which merges these dual themes of societal and individual interests to the advantage of both? For those who believe in the tenets of democracy, the latter question must be answered in the affirmative. Rather than subjugating the state's interests to an inferior position, the conscientious protection of each citizen's rights to an education is an essential element in advancing the purposes of the state.

The judiciary had less difficulty protecting individual rights when the chief role of the court was to prevent abuse of governmental

power. Recently, however, the government has been declared to have affirmative obligations to promote human rights, so much of this responsibility must be shared by the legislative and executive branches of the government.[56] In addition, courts must rely on the technical assistance of professional educators if standards concerning program adequacy in education are to be uniformly enforced.

Manageable Standards and Accountability

The controversial issues of evaluating adequacy of educational programs and equality among public schools are recurring themes which have discouraged judicial intervention in the educational arena. Should the courts demand equal distribution of educational resources among all children within a state, or a specified minimal level of achievement for students, or allocation of resources according to the varying needs of the pupils? Should the courts enforce a certain quantity of education for all children, or should judicial efforts focus on guaranteeing a specified quality of instruction in all public schools? And if the courts could agree on constitutional mandates concerning 'quality' and 'equality' required in public education, would the judiciary be able to devise criteria for evaluating whether the mandates were being met?

Such questions have caused some courts to declare educational issues nonjusticiable due to the lack of manageable standards for implementing

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[56] See A. Cox, supra note 4.

constitutional protections.[57] The courts often have been slow in enforcing constitutional guarantees when standards for evaluating remedies have been clear. Thus, in the educational realm, where there is much debate over standards, courts and juries have been extremely hesitant to deal with the intricacies of the pedagogical process. The current judicial emphasis on procedural safeguards may provide a temporary reprieve in the court's dilemma of establishing manageable standards for evaluating the constitutionality of educational programs, but it certainly will not eliminate the issue itself. Legislators, educators, and citizens still must grapple with the problems of developing criteria for measuring 'quality' and 'equality' in the public schools.

Debate continues concerning what the major purposes of public education should be. Obviously, it is an impossible task to measure the success of public schools or to evaluate the constitutionality of educational practices if the goals of the schools have not been identified. At present there is no agreement regarding the function of the school or what areas of learning belong in the public school's realm of responsibility. In addition, there is no consensus on whether emphasis should be placed on what the state provides its students or on what the students are able to achieve with that which the state provides. Questions also remain concerning the school's obligation to overcome environmental

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[57] See McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969); Burruss v. Wilkerson, 310 F. Supp. (W.D. Va. 1969), aff'd mem., 397 U.S. 44 (1970); Chapter IV, text accompanying notes 189-96, supra.

factors or to ensure that all citizens become functionally literate, if consensus could be reached on standards to measure literacy.[58]

Due to public unrest and disillusionment caused by the many problems currently plaguing society, there is a tendency for citizens to take out their frustrations on the public schools. Cries for accountability over the rising costs of public education are accompanied by unrealistic demands on the schools. If educational goals were clearly articulated, the public would become more knowledgeable concerning what should be expected from public education. Also, schools then could be held accountable for their stated goals, and educators would stand on firmer ground in demonstrating the need for additional resources to meet the agreed-upon objectives. Furthermore, perhaps citizens would formulate a realistic view of the function of public education and would begin to understand the scope of their protected rights in the domain of the school.

State regulations concerning education have traditionally been concerned with input factors (e.g., teacher salaries, textbooks, and

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[58]Webster Dictionary defines a literate person as one who is "able to read and write intelligently." However, this concise definition evades the relative value of literacy and of education in general. The United States Census Bureau considers all persons with over five years of formal education as 'literate'. This standard focuses on the quantity of schooling, rather than on the individual's actual competency. Perhaps three years of education would be adequate for a person to become functionally literate in some nations, while ten years of school attendance may be insufficient in certain parts of this country. For further discussion of criteria for determining literacy, see "Finding a Standard of Literacy," Croft Leadership Action Folio 75, Part B (1975).

facilities) rather than with output factors such as student achievement and the student's ability to perform successfully in actual 'life-related' situations. However, a recent encouraging sign is that several states are implementing educational accountability programs which include analysis of needs, definition of goals, and comprehensive plans for allocating resources to meet the needs of students.[59] Several state assessment programs may provide useful data concerning the correlation between program adequacy and pupil achievement, especially in the basic skill areas. A few states have even started defining minimal competencies which students are expected to master during their public school experience. Such 'survival skills' as the ability to read a newspaper, balance a checkbook, fill out job applications, and complete income tax returns are now being included in Oregon's requirements for high school graduation.[60]

There is also an increasing body of data relating input factors to output factors in education, and several researchers are computing the effects on the instructional program of various components such as class size, teacher characteristics, and type and quantity of materials.[61] Student diagnostic techniques and evaluation systems are also being

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[59] See E. House, W. Rivers, & D. Stufflebeam, "An Assessment of the Michigan Accountability System," Phi Delta Kappan, June, 1974, at 663; Legislation by the States: Accountability and Assessment in Education, Cooperative Accountability Project of Denver, Colorado (1974).

[60] See "Survival Test," Newsweek, January 20, 1975, at 69.

[61] See J. A. Thomas, The Productive School (1971); "Economics and the Financing of Education," Alternative Programs for Financing Education, National Educational Finance Project, Vol. 5 (1971); A. Swanson, "The Cost-Quality Relationship," The Challenge of Change in School Finance 151, Proceedings of the Tenth National Conference on School Finance (1967).

refined so that more accurate information can be gained concerning pupil needs and pupil progress. In addition, cost effectiveness studies and program-oriented budgeting systems are being implemented in many school districts in an effort to ensure that resources are efficiently distributed according to the needs identified and the objectives outlined for the school programs.[62]

The courts, therefore, will not be able to hide behind the 'lack of expertise' rationale much longer in shying away from making decisions regarding the constitutionality of educational programs. Experts are becoming available to serve as technical witnesses in assessing whether educational services are appropriate to the needs of the students. The judiciary has confidently relied on such expert advice in litigation involving complex medical and engineering issues. Thus, as educators produce additional concrete data concerning input/output correlations in education, perhaps the courts will have greater confidence in the testimony of noted authorities in the field. Hence, the challenge before the educational profession is to present a united front so that courts cannot claim that pedagogical issues are nonjusticiable due to the inability to measure pupil needs and the lack of standards for evaluating adequacy and equality among public schools.

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[62] See S. Mushkin, "Comments on Programming-Planning-Budgeting," The Challenge of Change in School Finance, id. at 169; "Economics and Financing of Education," id.

Legislative Responsibilities

There are obvious limitations on the judiciary's capacity to design and supervise remedies to improve educational services provided by the state. The congressional branch of government has access to resources needed for researching and designing alternative solutions to the many problems confronting education.[63] Thus, if courts and legislatures could work together as a team (rather than as adversaries), hopes for educational reform would be strengthened.

The Supreme Court may well be the final authority in interpreting the Constitution, but the judiciary alone cannot enforce constitutional mandates. Even the principles enunciated in the Brown desegregation ruling received mainly verbal compliance until the United States Congress began establishing laws to add force to the decision. Following the enactment of the Civil Rights Act of 1964, the efforts to desegregate schools in the South were greatly accelerated. After the three branches of government joined together in enforcing HEW regulations, which conditioned the receipt of federal funds on the establishment of unitary school systems, progress finally became noticeable in translating the principles of Brown into actual educational practices. Likewise, the Supreme Court decision in Lau v. Nichols was based on the fact that the school board's actions violated Title VI of the Civil Rights Act and HEW guidelines.[64] The Supreme Court's approval of the distribution of

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[63] See A. Cox, supra note 4, at 93-94.

[64] 414 U.S. 563 (1974). See D. Long, "Litigation Dealing with Urban School Finance Problems: Notes on Future Directions," Clearinghouse Review, September, 1974, at 337.

funds by federal agencies to compel school districts to meet the needs of minority children has certainly expedited the task of the courts in guaranteeing personal rights.

Thus, the constitutional obligation to enforce protection of the individual's rights in education rests on the legislative as well as the judicial branch of government. As state legislatures initiate more reform, intervention by the federal courts should decline in the management and operation of the schools.[65] Kurland has claimed that the legislature must be given freedom to search for constitutional answers to the problems of inadequacies and inequalities in education. After consensus is reached concerning solutions, then "the Supreme Court will be in a better position to put them into effect."[66]

Unfortunately, Kurland's statement seems a bit optimistic concerning the state legislatures' inclination to take the lead in initiating educational reform. Even though Americans may espouse the desire for equal educational opportunities, in actuality, the 'advantaged parents' want to maintain an advantaged position for their children. Obviously, legislators are not going to initiate reform measures in direct opposition to the desires of their influential constituents. Thus, there is always the possibility that majority interests will overrule the rights of minority groups in the legislative forum.

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[65]J. Hogan, The Schools, the Courts, and the Public Interest 157 (1974).

[66]P. Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," 35 U. Chi. L. Rev. 583, 600 (1968).

The legislative impasse, therefore, places a great burden on the courts to expose discriminatory practices in public schools, protect personal rights at stake, and launch long overdue educational reform. According to Maltby, only the courts can liberate state legislatures from their "historic political straight jacket" which has caused educational reform to flounder due to the dominance of advantaged school districts.[67] A statement made by a federal district judge in 1961 is very applicable to the task before the courts today: "This is not the moment in history for a state to experiment with ignorance. When it does, it must expect close judicial scrutiny of the experiment."[68]

The Judicial Challenge

In spite of inconsistencies in Supreme Court precedents, reluctance of legislatures to renovate state educational systems, and controversy over standards and accountability in public schools, egalitarians can still retain hope that the judiciary will mandate needed changes in public education. Whether it will be a slow evolution or a radical revolution, judicially required reform seems imminent. Sugarman has noted that the lawsuit is the "major weapon in the arsenal of those who wish to change American public schools."[69]

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[67]G. Maltby, "Restructuring School Finance: Legal and Financial Implications of the Serrano Case for the State of Oregon, Eric Reports, ED 074 606, April, 1972, at 7.

[68]Hall v. St. Helena Parish School Bd., 197 F. Supp. 649, 659 (1961).

[69]S. Sugarman, "Accountability Through the Courts," School Review, February, 1974, at 235.

Possibly the Supreme Court's emerging equal protection review coupled with the revival of due process analysis will provide a reasoned approach to evaluating state legislation and guaranteeing personal rights. The obscure code surrounding the individual's constitutional relationship to education finally will be broken if the judiciary takes a firm stand concerning how far the protective arm of the Federal Constitution reaches in guarding the citizen's rights to schooling provided by the state. Concerning the prospects for uniform judicial enforcement of adequate and equal public educational opportunities, Taylor has optimistically asserted that "with hard work, yesterday's political thickets sometimes become tomorrow's frontiers of equal justice."[70]

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[70]W. Taylor, "Avoiding the 'Thicket'," 2 J. L. & Educ. 482, 484 (1973).

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I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

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